S. HRG. 110–420

NATIONAL LABOR RELATIONS BOARD REPRESENTATION ELECTIONS AND INITIAL COLLECTIVE BARGAINING AGREEMENTS: SAFEGUARDING WORKERS' RIGHTS?

HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

SPECIAL HEARING

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CONTENTS

NATIONAL LABOR RELATIONS BOARD REPRESENTATION ELECTIONS AND INITIAL COLLECTIVE BARGAINING AGREEMENTS: SAFEGUARDING WORKERS' RIGHTS?

WEDNESDAY, APRIL 2, 2008

U.S. SENATE,
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 10:30 a.m., in room SD–138, Dirksen Senate Office Building, Hon. Tom Harkin (chairman) presiding.

Present: Senators Harkin and Specter.

OPENING STATEMENT OF SENATOR TOM HARKIN

Senator HARKIN. This committee will come to order.

Senator Specter, our ranking member, had spoken to me about having this hearing and we talked about it and discussed it. He requested that we have this hearing and I'm more than happy to oblige because we have traded this gavel many times over the last several years when he was chairman and I was ranking member and I'd request a hearing, he was always happy to oblige me on topics that interested me and that's how we operated in this subcommittee.

So, today, we're here to talk about an issue that's important to us both. We want to make sure that the NLRB is doing everything in its power to make sure elections are fair and we get a full and accurate picture of the barriers that exist to union organizing.

I believe strongly that when workers join together and act collectively, they can achieve economic gains and worker safety that they would not be able to get if they negotiated individually.

History tells us many things. Union members were on the frontlines fighting for the 40-hour work week. It wasn't management, it was labor that fought for that. Paid vacations. It wasn't management, it was unions that fought for that. Minimum wage. It wasn't management, it was unions who fought for that. Employer-provided health insurance and pensions. All of this was led by organized labor in passing legislation to ensure fair and safe workplaces.

They also fought to champion Social Security and Medicare and the Family and Medical Leave Act. So many of the things that we just take for granted today, we take for granted that we have paid vacations, we take for granted that we have pension programs, we

take for granted that we have sick leave and things like that, but they weren't always so, and we owe a great debt to organized labor for the struggles they fought to bring this to the American workplace. Many of these which workers around the world would like to have in their workplaces.

More than 47 million Americans lack health insurance. That's including about 251,000 of my fellow Iowans. Even those who get it find it covers less and less. This should not be happening. When productivity rises, everyone should see a fair share of the gain, but in the past several years, increasing productivity has gone hand in hand with a growing wage gap.

According to the non-partisan Congressional Research Service, adjusted for inflation, average worker pay rose 8 percent from 1995 to 2005. Average. But the median CEO pay at the 350 largest firms rose a 150 percent over the same period.

In my home State of Iowa, real median household income fell by 3.4 percent in that same 10-year period, from 1995 to 2005, at the same time that productivity increased. So, we get this productivity increased, median family income went down. What that tells me is that workers are working more and more, they're working harder, they're producing better, but they're not getting their fair share of the increase.

Is it a coincidence that all of these injustices are happening at a time when union membership has declined? As memberships decline, wages have stagnated. The numbers of uninsured have risen and private companies have been allowed to default on their pensions, threatening the retirement security of millions of Americans.

It's clear to me that in order to rebuild economic security for the middle class of America, we must rebuild strong and vibrant unions and to rebuild strong unions, we must reduce the unfair barriers to organizing.

So this morning, we'll hear from experts today about what sorts of barriers exist, from unfair labor practices in petition drives to worker intimidation during the elections. We'll hear testimony from Board members who oversee the election process. We have a notable academic who's just published a report on elections, and we have a respected attorney who has represented employers in organizing drives.

In the interests of full disclosure, I'll openly tell you that I'm a strong supporter of the Employee Free Choice Act. I have supported it. I know the Board members can't comment on legislation, but frankly, Iowans expect me to comment on legislation, to earn my keep, as I might say.

With that, I look forward to hearing your testimony and I now will turn to my ranking member, Senator Specter, for his opening remarks.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you, Mr. Chairman, and I thank you for a very close working relationship for many years, and as you have noted, we have changed party control but that has not shifted at all the way this subcommittee has functioned.

We've been able to work on a close bipartisan basis, and I think we have set a standard which other committees might be well advised to follow.

Senator HARKIN. I agree.

Senator SPECTER. When the gavel has shifted, we use the expression it's been a seamless shift of the gavel.

This is an important hearing. The National Labor Relations Act at its core is meant to protect the interests of workers. When the Senate initially debated the bill in 1935, Senator Robert Wagner noted in drafting the bill that the "free choice of the worker is the only thing I'm interested in."

The right confirmed by the National Labor Relations Act is the right to choose an exclusive bargaining representative and to use the representative to achieve a collective bargaining agreement.

In reviewing the work of the Board, I have been concerned about a number of factors, principally the long delays which are involved in protecting both rights of employees and employers, and I thank Chairman Schaumber and Board Member Liebman for their cooperation in advance of this hearing in acquainting my staff and me with the issues and concerns that the Board has.

I made an extensive floor statement some time ago on the issues relating to what the NLRB has done, and I would ask unanimous consent that it be included in the record at the conclusion of this statement.

Senator HARKIN. Without objection.

[The information follows:]

[From the Congressional Record, Tuesday, June 26, 2007]

EMPLOYEE FREE CHOICE ACT OF 2007

Mr. SPECTER. Madam President, I thank the distinguished chairman for yielding time. I have sought recognition to speak on the legislation entitled the "Employee Free Choice Act." I have had numerous contacts on this bill, both for it and against it, very impassioned contacts. People feel very strongly about it. The unions contend they very desperately need it. The employers say it would be an abdication of their rights to a secret ballot. I believe there are a great many important issues which need to be considered on this matter, and that is why I will vote, when the roll is called, to impose cloture so that we may consider the issue. I emphasize that on a procedural motion to invoke cloture—that is, to cut off debate—it is procedural only and that my purpose in seeking to discuss the matter is so that we may consider a great many very important and complex issues. I express no conclusion on the underlying merits in voting procedurally to consider the issue.

In my limited time available, I will seek to summarize. I begin with a note that the National Labor Relations Act does not specify that there should be a secret ballot or a card check but says only that the employee representative will represent in collective bargaining where that representative has been "designated or selected" for that purpose. The courts have held that the secret ballot is preferable but not exclusive.

In the case captioned "*Linden Lumber Division* v. *National Labor Relations Board*," the Supreme Court held that "an employer has no right to a secret ballot where the employer has so poisoned the environment through unfair labor practices that a fair election is not possible."

The analysis is, what is the status with respect to the way elections are held today? The unions contend that there is an imbalance, that there is not a level playing field, and say that has been responsible in whole or in part for the steady decline in union membership.

In 1954, 34.8 percent of the American workers belonged to unions. That number decreased in 1973 to 23.5 percent and in 1984 to 18.8 percent; in 2004, to 12.5 percent; and in 2006, to 12 percent. In taking a look at the practices by the National Labor Relations Board, the delays are interminable and unacceptable. By the time the NLRB and the legal process has worked through, the delays are so long that

there is no longer a meaningful election. That applies both to employers and to unions, that the delays have been interminable.

In the course of my extended statement, I cite a number of cases. In *Goya Foods*, the time lapse was 6 years; *Fieldcrest Cannon*, 5 years; *Smithfield*—two cases 12 and 7 years; *Wallace International*, 6 years; *Homer Bronson*, 5 years.

In the course of my written statement, I have cited a number of cases showing improper tactics by unions, showing improper tactics by employers. In the limited time I have, I can only cite a couple of these matters, but these are illustrative.

In the *Goya Foods* case, workers at a factory in Florida voted for the union to represent them in collective bargaining. Following the election, the company refused to bargain with the union and fired a number of workers for promoting the union. The workers filed an unfair labor practices case in June of 2000, seeking to require the employer to bargain.

In February of 2001, the administrative law judge found the company had illegally fired the employees and had refused to bargain. But it was not until August 2006 that the board in Washington, DC, adopted those findings, ordered reinstatement of the employees with backpay, and required *Goya* to bargain in good faith—a delay of some 5 years.

In the *Fieldcrest Cannon* case, workers at a factory in North Carolina sought an election to vote on union representation. To discourage its employees from voting for the union, the company fired 10 employees who had vocally supported the union. The employer threatened reprisal against other employees who had voted for the union and threatened that immigrant workers would be deported or sent to prison if they voted for the union. The union lost the election in August 1991. Although workers filed an unfair labor practice case with the NLRB, the administrative law judge did not decide the case until 3 years later, in 1994, and his order was not enforced by the Fourth Circuit until 1996—a lapse of some 5 years. In my written statement, I cite seven additional cases.

Similarly, there have been improper practices by unions. On the balance, I have cited nine on that line, the same number I cited on improper activities by employers.

At a Senate Appropriations subcommittee hearing, which I conducted in Harrisburg, PA, in July 2004, we had illustrative testimony from an employee, Faith Jetter:

Two union representatives came to my home and made a presentation about the union. They tried to pressure me into signing the union authorization card, and even offered to take me out to dinner. I refused to sign the card . . . shortly thereafter, the union representatives called again at my home and visited my home again to try to get me to sign the union authorization card. I finally told them that my decision was that I did not want to be represented . . . despite that . . . there was continuing pressure on me to sign.

At a hearing of the House Committee on Labor this February, witness Karen Mayhew testified about offensive pressure tactics by the unions. I would cite some of my own experience with the issue. When I was an assistant district attorney in Philadelphia, I tried the first case against union coercive tactics to come out of the McClellan Committee investigation. The McClellan Committee had investigated Local 107 of the Philadelphia Teamsters Union, found they had organized a goon squad, beat up people, and exercised coercive tactics to form a union. That case was brought to trial in 1963 and resulted in convictions of all six of the union officials and they all went to jail. Without elaborating on the detailed testimony, it was horrendous what the union practices were in that case.

There is no doubt if you take a look at the way the National Labor Relations Board functions—it is not functioning at all—but that it is dysfunctional.

If you take a look at the statistics, on the one category of intake, it declined from 1,155 in 1994, to 448 in 2006. In another category, it declined from almost 41,000 in 1994, to slightly under 27,000 in 2006. On injunctions, where the NLRB has the authority to go in and get some action taken promptly, it is used very sparingly, and again there is a steep decline: from 104 applications for injunctions in 1995, to 15 in 2005, and 25 in 2006. The full table shows a great deal of the ineptitude as to what is going on.

So what you have, essentially, is a very tough fought, very bitter contest on elections, very oppressive tactics used by both sides and no referee. The National Labor Relations Board is inert. It takes so long to decide the case that the election becomes moot, not important anymore. What they do is order a new election and they start all over again and, again, frequently the same tactics are employed.

If there is an unfair labor practice in a discharge, the most the current law authorizes the NLRB to do is to reinstate the worker with backpay. That is reduced by the amount the individual has earned otherwise, which is in accordance with the

general legal principle of mitigation of damages. But there is no penalty which is attached. So when you take a look at what the NLRB does, it is totally ineffective.

Those are issues which I think ought to be debated by the Senate. We ought to make a determination whether the current laws are adequate and whether there ought to be changes and whether there ought to be remedies. We ought to take a look, for example, at the Canadian system. When I did some fundamental, basic research, I was surprised to find that 5 of the 10 provinces of Canada employ the card check; that is, there is no right to a secret election. One of the provinces had the card check, rejected it, and then I am told went back to the card check. So their experiences are worthy of our consideration.

In Canada, elections are held 5 to 10 days after petitions are filed. I believe this body ought to take a close look at whether the procedures could be shortened, whether there could be mandatory procedures for moving through in a swift way—justice delayed is justice denied, we all know—whether there ought to be the standing for the injured parties to go into court for injunctive relief. That is provided now in the act, but only the NLRB can undertake it.

This vote, we all know, is going to be pro forma. We have the partisanship lined up on this matter to the virtual extreme. There is no effort behind the debate which we are undertaking today to get to the issues. There is going to be a pro forma vote on cloture. Cloture is not going to be invoked. We are going to move on and not consider the matter. We know there are enough votes to defeat cloture. The President has promised a veto. So it is pro forma.

But that should not be the end of our consideration of this issue because labor peace—relations between labor and management—is very important, and we ought to do more by way of analyzing it to see if any corrections are necessary in existing law.

It is worth noting, in the history of the Senate, there has been considerable bipartisanship—not present today. But listen to this: In 1931, the Davis-Bacon Act was passed by a voice vote. In 1932, the Norris LaGuardia Act was passed by a voice vote. In 1935, the National Labor Relations Act, also known as the Wagner Act, was passed by a voice vote. In 1938, the Fair Labor Standards Act was passed, again, by a voice vote. In 1959, only two Senators voted against the Landrum-Griffin bill.

A comment made by then-Senator John F. Kennedy, on January 20, 1959, commenting on the Landrum-Griffin bill, is worth noting. I quote only in part because my time is about to expire, but this is what Senator John F. Kennedy had to say:

"[T]he necessity for bipartisanship in labor legislation is a principle which should guide us all. . . . The extremists on both sides are always displeased. . . . Without doubt, the future course of our action in this area will be plagued with the usual emotional arguments, political perils, and powerful pressures which always surround this subject.

Madam President, I ask unanimous consent for 1 additional minute.

The ACTING PRESIDENT pro tempore. Is there objection?

Without objection, it is so ordered.

Mr. SPECTER. In conclusion, it would be my hope we would take a very close look at this very important law in this very important field and recognize that harmonious relations between management and labor are very important. That is not the case today, with a few illustrations I have given in my prepared statement. We ought to exercise our standing, which we pride ourselves as the world's greatest deliberative body.

Although that will not be done today because cloture is not going to be invoked, I intend to pursue oversight through the subcommittee where I rank which has jurisdiction over the NLRB.

Madam President, I ask unanimous consent that my extensive statement be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF SENATOR ARLEN SPECTER—S.1041, THE EMPLOYEE FREE CHOICE ACT

Mr. SPECTER. Mr. President, I seek recognition today to discuss the legislation entitled the Employee Free Choice Act. The Senate will later today vote on Cloture on the Motion to Proceed to this important legislation. The Senate prides itself on being the world's greatest deliberative body, and I am voting for cloture to enable the Senate to deliberate on this legislation and the important issues it raises in an open and productive manner.

The Employee Free Choice Act is an issue of deep and abiding interest to labor organizations and to employers. There has been intense advocacy on both sides. At the field hearing in Pennsylvania in July 2004, and in the many discussions that

I have had with labor leaders and employers since that time, I have heard evidence indicating that employees are often denied a meaningful opportunity to determine whether they will be represented by a labor union. There are many stories and cases about employers asserting improper influence over their employees prior to an election, and there are also many cases of unions attempting to assert undue influence over workers in an attempt to establish a union. I am talking about threats, spying, promises, spreading misleading information, and other attempts to coerce workers and interfere with their right to determine for themselves whether they wish to be represented by a labor organization. Based on what I have heard, I have concerns that we have lost the balance of the National Labor Relations Act's fundamental promise—that workers have the right to vote in a fair election conducted in a non-threatening atmosphere, free of coercion and fear, and without undue delay. Workers should be assured that their decisions will be respected by their employer and the union—with the support of the government when necessary. The overwhelming evidence demonstrates that the NLRB is not doing its job and is dysfunctional.

In light of the numerous contacts I have had with constituents on both sides of this issue, and in consideration of the evidence that has been presented by both sides, I have decided to hold off on cosponsoring the Employee Free Choice Act in the 110th to give more opportunity to both sides to give me their views and to give me more time to deliberate on the matter. At a time when union membership is decreasing and when employers face increasing competition in a global economy, it is our duty in Congress to have a vigorous debate and to reach a decision on the issues that the Employee Free Choice Act purports to resolve.

The 1935 Wagner Act guarantees the right of workers to organize, but it does not require that unions be chosen by election. Instead, section 9 provides more broadly that an employee representative that has been "designated or selected" by a majority of the employees for the purpose of collective bargaining shall be the exclusive representative of those employees in a given bargaining unit. The act further authorizes the National Labor Relations Board to conduct secret ballot elections to determine the level of support for the union when appropriate. Since 1935, secret ballot elections have been the most common method by which employees have selected their representatives.

Labor organizations have experienced a sharp decline in membership since the 1950s. Unions represented 34.8 percent of American workers in 1954, 23.5 percent in 1973, 18.8 percent in 1984, 15.5 percent in 1994, 12.5 percent in 2004, and 12 percent in 2006. In Senate debate, we should consider whether labor laws have created an uneven playing field that has led to this dramatic decline.

We should also consider where the fault lies in deciding what changes, if any, should be made to our labor laws. There are certainly abuses by both unions and employers. The Supreme Court described the problem in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), noting that "we would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue." The following cases and testimony are illustrative of this problem:

At a July 2004 Senate Appropriations Subcommittee I held in Harrisburg, Pennsylvania entitled "Employee Free Choice Act—Union Certifications," a letter from employee Faith Jetter was included in the record. In that letter, Ms. Jetter testified: "Two union representatives came to my home and made a presentation about the union. They tried to pressure me into signing the union authorization card, and even offered to take me out to dinner. I refused to sign the card . . . shortly thereafter, the union representatives called again at my home and visited my home again to try to get me to sign the union authorization card. I finally told them that my decision was that I did not want to be represented . . . despite that . . . I felt like there was continuing pressure on me to sign."

In testimony before the Senate Committee on Health, Education, Labor , and Pensions on March 27, 2007, in a hearing entitled "The Employee Free Choice Act: Restoring Economic Opportunity for Working Families," Peter Hurtgen, a former chairman of the NLRB, testified that "in my experience, neutrality/card check agreements are almost always the product of external leverage by unions, rather than an internal groundswell from represented employees."

On February 8, 2007, at a hearing of the House Committee on Labor, Education and Pensions entitled "Strengthening America's Middle Class through the Employee Free Choice Act," Karen Mayhew, an employee at a large HMO in Oregon, testified that local union organizers had misled many employees into signing authorization cards at an initial question-and-answer meeting. She said: "At the meeting, employ-

ees asked the union agents questions about the purpose of the cards. The union agents responded by telling us that signing the card only meant that the employee was expressing an interest in receiving more information about the union, or to have an election to decide whether or not to bring the union in. It was made clear to all of us there in attendance that those authorization cards did NOT constitute a vote right there and then for exclusive representation by SEIU."

A May 22, 2007 National Review article by Deroy Murdock entitled "Union of the Thugs" quoted Edith White, a food-service worker from New Jersey who recalled being visited by a union organizer who told her that she "wouldn't have a job" if she did not sign the authorization card and that "the Union would make sure" that she was fired.

A June 29, 2006 Boston Globe article by Christopher Rowland entitled "Unions in Battle for Nurses" reported that organizers at a local hospital had told nurses that signing an authorization card would "merely allow them to get more information and attend meetings." The nurses were quoted as saying that the process "left [them] feeling deceived and misled."

On February 8, 2007, at a hearing of the House Committee on Labor, Education and Pensions entitled "Strengthening America's Middle Class through the Employee Free Choice Act," Jen Jason, a former labor organizer for UNITE HERE, testified that she was trained to create a sense of agitation in workers and to capitalize on the "heat of the moment" to get workers to sign union support cards. She compared the American system of free ballots to the check card system in Canada, where she also worked as a union organizer, noting "my experience is that in jurisdictions in which 'card check' was actually legislated, organizers tend[ed] to be even more willing to harass, lie, and use fear tactics to intimidate workers into signing cards." She also noted that "at no point during a 'card check' campaign is the opportunity created or fostered for employees to seriously consider their working lives and to think about possible solutions to any problems."

At that same hearing before the House Committee on Labor, Education and Pensions, a former union organizer, Ricardo Torres, testified that he resigned because of "the ugly methods that we were encouraged to use to pressure employees into union ranks." He testified that "I ultimately quit this line of work when a senior Steelworkers union official asked me to threaten migrant workers by telling them they would be reported to federal immigration officials if they refused to sign check-off cards during a Tennessee organizing drive. . . . Visits to the homes of employees who didn't support the union were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn't change their minds about the union."

Enactment of the Landrum-Griffin Act in 1959 followed extensive Senate hearings by the McClellan Committee on union abuses. Based on evidence compiled by that Committee, where Senator John F. Kennedy was a member and Robert F. Kennedy was General Counsel, I secured the first convictions and jail sentences from those hearings for six officials of Local 107 of the Teamsters Union in Philadelphia. That union organized a "goon squad" to intimidate and beat up people as part of their negotiating tactics. Their tactics were so open and notorious that my neighbor, Sherman Landers, with whom I shared a common driveway, sold his house and moved out, afraid the wrong house would be fire-bombed. The trial, which occurred from March through June 1963, was closely followed by Attorney General Kennedy who asked for and got a personal briefing on the case and then offered me a position on the Hoffa prosecution team.

Similarly, there are many examples of employer abuses during campaigns and initial bargaining. Each of the following cases illustrates the principle often attributed to William Gladstone: "Justice delayed is justice denied."

In the *Goya Foods* case, 347 NLRB 103 (2006), workers at a factory in Florida voted for the union to represent them in collective bargaining negotiations. Following the election, the company refused to bargain with the union and fired a number of workers for promoting the union. The workers filed an unfair labor practices case in June of 2000, seeking to require the employer to bargain. In February of 2001, the Administrative Law Judge found that the company had illegally fired the employees and had refused to bargain. It was not until August of 2006, however, that the Board in Washington, D.C. adopted those findings, ordered reinstatement of the employees with back pay, and required Goya to bargain in good faith—6 years after the employer unlawfully withdrew recognition from the union.

In the *Fieldcrest Cannon* case, 97 F.3d 65 (4th Cir. 1996), workers at a factory in North Carolina sought an election to vote on union representation in June of 1991. To discourage its employees from voting for the union, the company fired at least 10 employees who had vocally supported the union, threatened reprisal against employees who voted for the union, and threatened that immigrant workers would

be deported or sent to prison if they voted for the union. The union lost the election in August of 1991. Although workers filed an unfair labor practice case with the NLRB, the Administrative Law Judge did not decide the case until three years later, in 1994, and his order was not enforced by the Fourth Circuit until 1996—5 years after the election.

In the *Smithfield* case, 447 F.3d 821 (D.C. Cir. 2006), employees at the Smithfield Packing Company plant in Tar Heel, North Carolina filed a petition for an election. In response, the employer fired several employees, threatened to fire others who voted for a union and threatened to freeze wages if a union was established. The workers lost two elections—one in 1994 and one in 1997. Workers filed an unfair labor practices case. The administrative law judge ruled for the workers in December of 2000, but the NLRB did not affirm that decision until 2004, and the Court of Appeals did not enforce the order until May of 2006—12 years after the first tainted election.

In another case involving the *Smithfield Company*, 347 NLRB 109 (2006), employees at the Wilson, North Carolina location sought an election for union representation. Prior to the election, the company fired employees who were leading the union campaign and threatened and intimidated others. The union lost the election in 1999. The workers filed an unfair labor practices case and the Administrative Law Judge found in 2001 that the employer's conduct was so egregious that a Gissel bargaining order (which mandates a card check procedure instead of an election) was necessary because a fair election was not possible. However, by the time the NLRB affirmed the ALJ's decision in 2006, it found that the NLRB's own delay in the case prevented the Gissel bargaining order from being enforceable and—7 years after the employer prevented employees from freely participating in a fair election—the remedy the Board ordered was a second election.

In the *Wallace International* case, 328 NLRB 3 (1999) and 2003 NLRB Lexis 327 (2003), the employer sought to dissuade its employees from joining a union by showing its workers a video in which the employer threatened to close if the workers unionized and the town's mayor urged the employees not to vote for a union. The union lost an election in 1993. The Board ordered a second election, which was held in 1994, that was also tainted by claims of unfair labor practices. The employees brought unfair labor practice cases after the election. In August 1995, the ALJ found against the employer and issued a Gissel bargaining order because a fair election was impossible. However, as in the *Smithfield* case, by the time the NLRB finally affirmed the ALJ's decision, in 1999, the Gissel order was not enforceable. In subsequent litigation, an ALJ found that the employer's unlawful conduct, including discriminatory discharge, had continued into 2000—7 years after the first election.

In the *Homer Bronson Company* case, 349 NLRB 50 (2007), the ALJ in 2002 found that the employer had unlawfully threatened employees who were seeking to organize that the plant would have to close if a union was formed. The Board did not affirm the decision until March 2007, again noting that a Gissel order, though deemed appropriate by the NLRB General Counsel, would not be enforceable in court because of the delays at the NLRB in Washington, D.C.

The National Labor Relations Board found unlawful conduct by employers in a number of recent cases in my home State of Pennsylvania:

In the *Toma Metals* case, 342 NLRB 78 (2004), the Board found that at least eight employees at Toma Metals in Johnstown, PA were laid off from their jobs because they voted to unionize the company. In addition, David Antal, Jr. was terminated because he told his supervisor that he and his fellow employees were organizing a union. He was laid off the same evening the union petition was filed.

In the *Exelon Generation* case, 347 NLRB 77 (2006), the Board found that the employer in Limerick and Delta, PA threatened employees during an organizing campaign that they would lose their rotating schedules, flextime, and the ability to accept or reject overtime if they voted for union representation.

In the *Lancaster Nissan* case, 344 NLRB 7 (2005), the Board found that the employer failed to bargain in good faith following a union election victory by limiting bargaining sessions to one per month. The employer then unlawfully withdrew recognition from the union a year later based on a petition filed by frustrated employees, automotive technicians.

In addition to showing employer abuses, these cases demonstrate the impotency of existing remedies under the NLRA to deal effectively with the problem. Further, the convoluted procedures and delays in enforcement actions make the remedies meaningless. In 1974, in *Linden Lumber Division* v. *NLRB*, 419 U.S. 301 (1974), the court made it clear that an employer may refuse to recognize a union based on authorization cards and insist upon a secret ballot election in any case, except one in which the employer has so poisoned the environment through unfair labor practices that a fair election is not possible. In those cases involving egregious employer con-

duct, the Board may impose a "Gissel" order that authorizes card checks. This remedy takes its name from *NLRB* v. *Gissel Packing Co.*, which I cited earlier.

Most often, however, when the Board finds that an employer improperly interfered with a campaign, it typically only orders a second election, often years after the tainted election, and requires the employer to post notices in which it promises not to violate the law.

The standard remedy for discriminatory discharge, the most common category of charges filed with the NLRB, is an order to reinstate the worker with back pay, but any interim earnings are subtracted from the employer's back pay liability, and often this relief comes years after the discharge.

The other common unfair labor practice case involves an employer's refusal to bargain in good faith. The remedy is often an order to return to the bargaining table.

In relatively few cases each year, the NLRB finds that the unfair labor practices are so severe that it chooses to exercise its authority under section 10(j) of the NLRA to seek a Federal court injunction to halt the unlawful conduct or to obtain immediate reinstatement of workers fired for union activity. The NLRB too rarely exercises this authority, and the regional office must obtain authorization from Washington, D.C. headquarters to seek injunctive relief.

Additionally, under the procedures of the act, after the union wins an election, the employer may simply refuse to bargain while it challenges some aspect of the pre-election or election process. The union must then file an unfair labor practice charge under section 8(a)(5), go through an administrative proceeding, and ultimately the matter may be reviewed by a Federal court of appeals, since a Board order is not self-enforcing. All of this takes years.

The following tables reflect that from 1994 to 2006 the number of cases handled by the NLRB regional offices declined steadily from 40,861 cases in 1994 to 26,717 in 2006. Yet, despite this decline in workload, in 2005 the median age of unresolved unfair labor practice cases was 1,232 days, and for representation cases the median age was 802 days. In 1995, the NLRB sought 104 injunctions; in 2005, it sought 15; and in 2006, 25 injunctions. In Washington, D.C., the Board's caseload declined from 1,155 cases in 1994 to 448 cases in 2006.

The number of decisions issued declined from 717 in 1994 to 386 in 2006. The backlog hit a peak of 771 cases in 1998 and declined to 364 in 2006, but that decline must be viewed in the context of a case intake for the Board that had fallen to only 448 cases in 2006.

TABLE 1.—REGIONAL OFFICE STATISTICS

	1994	1995	1996	1997	1998	2003	2004	2005	2006
Case Intake	40,861	39,935	38,775	39,618	36,657	33,715	31,787	29,858	26,717
ULP (Case Age in Days)	758	893	846	929	985	1,030	1,159	1,232	.....
Representation (Case Age in Days)	152	305	369	370	473	473	576	802	.....
Section 10(j)	83	104	53	45	17	14	15	25	.....

TABLE 2.—WASHINGTON OFFICE STATISTICS

	1994	1995	1996	1997	1998	2003	2004	2005	2006
Case Intake	1,155	1,138	997	1,084	1,083	818	754	562	448
Decisions	717	935	709	873	708	543	576	508	386
Case Backlog	585	459	495	672	771	673	636	544	364

What has the Board been doing? Although many cases are resolved at earlier stages out in the regions where the NLRB may be generally effective, one must ask why it took years for the Board to order reinstatement in the cases cited earlier?

During the Senate's debate on the Employee Free Choice Act, it is important that we focus on the employees' interests, not on the employers' or the unions' interests. We must protect employees from reprisals from either side. We must ensure they have an environment in which they may make a free choice. We must ensure that employees' decision, whether it is for or against representation, is respected. And we must ensure that if the employees do choose to be represented, they can have confidence that their employer will bargain with the union, and that the employer will not try to undermine the union by threatening the employees during bargaining for an initial agreement.

And finally, we must ensure that the Federal statute designed to provide this protection of employees—and the government agency tasked with the statute's enforcement—are effective. If the statute needs to be modified to provide stronger remedies or more streamlined procedures, then that should be addressed. If the NLRB itself is causing delay and confusion as to what the law is, then that should be addressed. We do not need symbolic votes. We need meaningful debate and careful consideration of these important issues. America's workers deserve nothing less.

It is worthwhile to look at the experience of our neighbor, Canada, where five of the ten provinces use the card check procedure instead of secret ballot elections. In hearings this year before the Senate and the House concerning the Employee Free Choice Act, witnesses testified that unions are more successful in their organizing campaigns under the card check system—perhaps an indication that card check prevents employers from exercising undue influence over workers to prevent unionization. On the other hand, there was testimony suggesting that the Canadian card check system has allowed unions to exert undue influence on employees in order to obtain their signatures on union recognition cards.

In a 2004 study of the gap between Canadian and U.S. union densities, an economics professor from Ontario found that simulations suggest that approximately 20 percent of the gap could be attributed to the different recognition procedures—card check or secret ballot elections—in the two countries. She further noted that the election procedures in Canada are not identical to those of the United States. I am intrigued by the fact that union elections in Canada must take place within 5 to 10 days after an application or petition is filed, depending on the province. In the United States there is no such statutory time limit between petition and voting, and it may be several months before the election is held. This creates a wider window of opportunity for the employer to influence workers, using legal or illegal means. The professor also notes that when unfair labor practices occur, the differences in procedures and the role of the courts in the two countries mean that it is faster and less expensive to process complaints in Canada than in the United States.

In 2001, another economics professor published a study in which he noted that in the previous decade, an increased number of Canadian provinces had abandoned their long-standing tradition of certification based on card check by experimenting with mandatory elections. In British Columbia, for example, legislation requiring elections was enacted in 1984 and then abandoned in 1993. In examining the impact of union suppression on campaign success in British Columbia, the professor tested whether the length of an organizing drive had an impact on organizing success. The evidence demonstrated that the probability of a successful organization of employees decreased by 1 percent for every 2 days of delay when an unfair labor practice was involved. The unfair labor practice itself decreased the probability of success even further. The professor observed that mandatory elections, as compared with a card check system, were detrimental to unions' success. He found that not only did success rates fall, but the number of certification attempts fell substantially as well. He concluded that unions believe organizing will be more difficult under mandatory voting as so are less willing to invest in it. He concluded his paper with this observation:

It seems more likely, however, that the recent trend towards compulsory voting represents a shift in beliefs towards elections as a preferable mechanism for determining the true level of support within the bargaining unit. . . . If governments are opting for a more neutral stance towards unions, our results suggest that stricter employer penalties should be considered. Currently even when an [unfair labor practice claim] is found to be meritorious, penalties for illegal employer coercion are largely compensatory. . . . . Furthermore, our evidence shows that strict time limits form a useful policy tool in encouraging neutrality in the organizing process since the combination of union suppression and a length certification process is quite destructive.

I also note a 2006 study published in the Industrial Law Journal by an Oxford professor who has studied the statutory recognition procedures in England's Trade Union and Labour Relations Act of 1992. He compares the English, Canadian and American systems, and states at page 9: "Indeed, the law itself has erected the most substantial barriers to unions' organizational success, and this is manifest in the dilatoriness of legal procedures. Delay erodes the unions' organizational base by undermining workers' perceptions of union instrumentality." These studies of the Canadian and the English experiences are instructive if we are to carefully consider the many aspects of the secret ballot election process.

Since 1935, there have been two major substantive amendments to Federal labor law. In 1947, Congress passed the Taft-Hartley Act and, in 1959, it passed the

Landrum-Griffin Act. These additions to the law strengthened workers' right to refrain from union activity and regulated the process of collective bargaining and the use of economic weapons during labor disputes, but Congress has not amended the provisions of Federal labor law that protect the right of self-organization.

On July 18, 1977, President Carter asked Congress for labor law reform legislation. His proposals were incorporated into H.R. 8410, which was introduced on July 19, 1977. An identical bill, S. 1883, was introduced that same day by Senators Williams and Javits. Ten days of hearings by the Subcommittee on Labor-Management Relations began on July 25, 1977.

UNIONS, FORMER SECRETARIES OF LABOR, CIVIL RIGHTS AND THE RIGHT TO WORK COMMITTEE TESTIFIED AGAINST H.R. 8410

In the House alone, from 1961 through 1976, over 60 days of hearings were held on the National Labor Relations Act. Nineteen days of hearing were held between July 15, 1975 and May 5, 1976, concerning, among other bills: H.R. 8110, to expedite the processes and strengthen the remedies of the Labor Act with respect to delegation and treble damages; H.R. 8407 to include supervisors within the protection of the Act; H.R. 8408, to improve the administration and procedures of the Board in terms of technical amendments; H.R. 8409, to strengthen the remedial provision of the act against repeated or flagrant transgressors; and H.R. 12822, to amend the National Labor Relations Act to expedite elections, to create remedies for refusal-to-bargain violations, and other purposes. In 1978, H.R. 8410 was debated for 20 days in the Senate. After failing 5 cloture votes on the bill and amendments, the bill was returned on June 22, 1978 to the Senate Committee on Human Resources, and there it died. We should try again to address the problems raised during these extensive hearings and debates.

The National Labor Relations Act created a system of workplace democracy that to a large extent has served our nation well for more than 70 years. American labor unions, with a strong history of social progress and accomplishments in improving the workplace, have made America and the American economy strong. Yet, despite these successes, the NLRA is too often ineffective at guaranteeing workers' rights in the face of bad conduct by some employers and some unions.

The essential plan and purpose of the Wagner Act was described by President Franklin Roosevelt when he signed the measure into law:

"This act defines, as part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the government can safeguard that legal right. It establishes a National Labor Relations Board to hear and determine cases in which it is charged that this legal right is abridged or denied, and to hold fair elections to ascertain who are the chosen representatives of employees.

A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining, it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor it seeks, for every worker within its scope, that freedom of choice and action which is justly his. . . ."

It has been too long since the Senate has fully and freely debated whether our labor laws continue to adequately safeguard workers' rights. It is important that we focus on the real problems with the NLRA and try to achieve a result that can garner bipartisan support. Just take a look at the bipartisan support that has been a necessary basis of any successful labor legislation:

In 1926, only 13 Senators voted against the Railway Labor Act.

In 1931, the Davis-Bacon Act was passed by voice vote.

In 1932, the Norris-LaGuardia Act was passed by voice vote.

In 1935, the National Labor Relations Act (also known as the Wagner Act) was passed by voice vote.

In 1936, the Walsh-Healey Public Contracts Act was passed by voice vote.

In 1938, the Fair Labor Standards Act was passed by voice vote.

In 1947, the Taft-Hartley Act was passed when 68 Senators voted to override President Truman's veto.

In 1959, only 2 Senators voted against the Labor -Management Reporting and Disclosure Act (also known as the Landrum-Griffin Act).

In 1965, the McNamara-O'Hara Service Contract Act was passed by voice vote.

In 1974, not a single Senator voted against the Employee Retirement Income Security Act.

On January 20, 1959, Senator John F. Kennedy introduced a section of the Landrum-Griffin Act. His remarks in his floor speech were instructive and prophetic:

"[T]he necessity for bipartisanship in labor legislation is a principle which should guide us all. . . . So let us avoid . . . . unnecessary partisan politics or uninformed or deliberate distortions. This is particularly true in the controversial field of labor—which is precisely why no major labor legislation has been passed in the last decade. The extremists on both sides are always displeased. . . . [But] in the words of Business Week magazine . . . 'wise guidance in the public interest can be substituted for concern over wide apart partisan positions.' I wish to mention the key provisions of the bill introduced today—the basic weapons against racketeering which will be unavailable in the battle against corruption if such a measure is not enacted by the Congress this year: . . . Secret ballot for the election of all union officers or of the convention delegates who select them. . . . This is, in short, a strong bill—a bipartisan measure—a bill that does the job which needs to be done without bogging down the Congress with unrelated controversies. Without doubt, the future course of our action in this area will be plagued with the usual emotional arguments, political perils, and powerful pressures which always surround this subject."

I am voting for cloture today because I believe that it is time for Congress to thoroughly debate this issue and to address the shortcomings in the National Labor Relations Act in a bipartisan and comprehensive manner.

Mr. SPECTER. Madam President, I thank the Chair and yield the floor.

Senator SPECTER. In that statement, I have noted fault candidly on both sides, on the side of unions and on the side of employers, in tactics which ought not to have been engaged in, at least those are the allegations, and the Congress is not structured to litigate or adjudicate those matters. It's a matter for the Board, for the administrative law judges.

I've been particularly concerned with the delays. The statement that I've already introduced goes into some delay, which I will not take the time during this brief opening statement to talk about, on the excesses on both sides, and it also details some of the very long delays and the delays are commonplace.

In the *Goya Foods* case, 2006, there was a delay of 6 years. In the *Fieldcrest Cannon* case, 1996, a delay of 5 years. In the *Smithfield* case, a delay of 7 years. In the *Lawless International* case, *Homer Bronson* case, both 7 years delay, and in the *United Food* and *Commercial Workers Union*, reported at the 447 F.3rd 821, a 2006 opinion of the District of Columbia Circuit, it dealt with allegations of improper employer tactics in 1994 and 1997 where it took until the year 2000 for the administrative law judge to make a finding. The NLRB did not adopt the findings until 2004 and the Court of Appeals did not affirm until 2006, a delay of some 12 years, and we don't need any analysis to say that that's excessive and unsatisfactory.

The principle of justice delayed and justice denied is well known in our judicial system and our Board system and we have to find a way to do better.

I know it has been difficult for the Board to function. It's shorthanded with only two of the five members of the Board. One of the issues which I think ought to be explored legislatively is whether there ought to be a provision that the Board member retain his position until his replacement, his or her replacement is made.

So, those are some of the issues, matters of really great importance, but we thank you for your service, Chairman Schaumber, Board Member Liebman, and look forward to your testimony.

Thank you, Mr. Chairman.

Senator HARKIN. Thank you, Senator Specter. Well, welcome. We have two panels this morning. We'll start with our first panel here.

Chairman Peter Schaumber joined the Board in 2002, was recently appointed to be chairman. Prior to the Board, he was a labor arbitrator for various industry panels. A native of New York, Mr. Schaumber graduated from Georgetown and received his JD from Georgetown University Law Center.

Our second panelist is Wilma Liebman, joined the Board in 1997. Prior to that, Deputy Director of the Federal Mediation and Conciliation Service, another agency under this subcommittee's jurisdiction.

I understand Ms. Liebman started her career as a staff attorney at the NLRB and originally from Philadelphia, B.A. from Barnard College and a JD from George Washington University Law Center.

For this panel and for the second panel, your statements will be made a part of the record in their entirety. They're fairly lengthy statements. I would ask if you could briefly summarize them in, oh, less than 10 minutes, I would sure appreciate it, and then we'll open it up for questioning.

Mr. Schaumber, welcome.

STATEMENT OF HON. PETER C. SCHAUMBER, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD

Mr. SCHAUMBER. Thank you. On behalf of myself and my esteemed colleague, Member Liebman, I want to thank Chairman Harkin, ranking member Specter, and all of the members of this committee for inviting us to testify on the vitally important issue of safeguarding workers' rights.

Senator Specter, I want particularly to thank you for your longstanding and consistent support of the National Labor Relations Board. Your example in this regard inspires all of us to work to make the promise of the National Labor Relations Act a reality.

A little over 5 years ago, I had the honor and privilege of becoming a member of the NLRB. Two weeks ago, I received the added honor and responsibility of being designated by the President as the Board's Chairman.

You've invited us here today to discuss two topics: the Board's representation election procedures and first contract negotiations in those instances in which employees have exercised their right to designate a collective bargaining representative.

I'll address those subjects and do my best to answer your questions concerning them. Preliminarily, however, as you know, it's the Board's tradition that sitting Board members avoid commenting on legislative proposals to amend the act, and I intend to honor that tradition in my comments today.

As the Supreme Court has emphasized, the act is wholly neutral when it comes to the basic choice of employees to choose or reject union representation. The act guarantees employees the right to make their own informed judgments about the benefits of union representation and collective bargaining and to express those judgments through secret ballot elections, which both the courts and the Board have frequently acknowledged to be the preferred and most reliable means of determining employee sentiment.

One of the Board's chief responsibilities is to administer the electoral process through which employee free choice is effectuated and the Board's record in this regard, I believe, is an exemplary one.

The Board, by the way, has delegated the authority to conduct elections to the general counsel. Very briefly, as you know, the process begins with the filing of a petition. The two most frequently filed are RC or certification petitions and RD or decertification petitions; that is, to certify a union or decertify a union.

Far less frequently, there are RM petitions which employers may file under certain circumstances.

The agency's goal is to conduct an election within a median time of 42 days. In fiscal year 2007, we exceeded that goal, achieving a petition-to-election median of 39 days. This record of timeliness is owing in large measure to the agency's success in encouraging the parties to resolve pre-election issues by mutual agreement. In fiscal year 2007, stipulated pre-election agreements were achieved in 90 percent of the cases.

Needless to say, due process cannot be sacrificed on the altar of speed. In the less than 10 percent of cases where the parties cannot resolve their pre-election differences voluntarily, the region conducts a pre-election hearing and issues a decision and direction of election.

In fiscal 2007, nearly 94 percent of decision and directions were issued within 36 days of petition filing and that included the hearing, briefing by the parties, and the decision.

If a party then asks the Board to review the decision, the Board's goal is to act on the request within 14 days of filing. In fiscal year 2007, there were 113 pre-election requests for review. The Board denied review in 96 of them in a median time of 14 days.

Once again, I think the Board's statistics are impressive. In addition to the 39 days for an election, 93 percent of all elections were concluded within 56 days of filing, 99 percent of all elections within 80 days.

I want to emphasize something which was not mentioned in my statement because I was unaware of a bit of a discrepancy in the figures. This refers to those elections which were not blocked. If a ULP is filed during the organizing campaign and after a petition for election is filed, the union may file a charge and the election can be blocked.

In 2007, 4.8 percent of elections were blocked for a period on the average of 42.5 days as a result of such charges having been filed. Now the election doesn't have to be blocked. The union may request that it proceed. The region presumes that the charge is meritorious. It simply asks itself the question whether the election can go forward and without being tainted, if the charge were meritorious.

As far as unfair labor practice cases, the agency's record of timeliness and efficiency in processing election petitions is only part of the story. To make the act's promise of employee free choice meaningful, the Board has a responsibility to ensure, first, that this choice is registered in an atmosphere free of intimidation and coercion, and, second, when employees have freely chosen union representation, that this choice be safeguarded through vigorous enforcement of sections 8(a)(5) and 8(a)(3) of the act.

These responsibilities the Board fulfills in processing unfair labor practice cases. As I detail in my written statement, I believe here, too, the Board's track record, while subject to some of the notable exceptions mentioned by Senator Specter, is nevertheless an impressive one. I won't repeat the supporting data set forth in my written statement. I'd like to just make a few points.

First, the Board's inventory of pending cases is at its lowest level in over 30 years and that is not wholly attributed to reduced intake, although concededly it is a result in part of reduced intake, also.

Second, 97 percent of meritorious ULP charges are settled.

Third, from December 2002 through September 30, 2007, the end of the Board's fiscal year, the Courts of Appeal enforced Board decisions in all or in part 88 percent of the time. Indeed, in fiscal year 2007, that figure was 97 percent. These are some of the very highest rates of enforcement in the Board's history.

By contrast, in fiscal year 2002, the courts enforced the Board in whole or in part less than 71 percent of the time.

That having been said, as mentioned, some cases, it is true, have languished. The reasons therefore are multiple and in part beyond the agency's control, such as the absence of a full Board. Those cases now, however, I believe, are the exception. The rule is seen now in the many, many ULP cases disposed of quickly, efficiently and fairly.

Very briefly with respect to first contract negotiations. The extent of the problem, that is, the extent to which ULPs result in the failure of the parties to reach first contract, is unclear.

In the general counsel's memo of April 19, 2006, he said, and I quote, "Charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly-certified units (28 percent)."

These numbers, however, appear inconsistent with other information we have received on meritorious ULP charges filed in first contract bargaining. Consequently, we have asked the general counsel for an explanation and we will provide the committee with that information as soon as it is received.

[The information follows:]

First, I noted in my hearing testimony that I would clarify an apparently inaccurate figure reported by the agency's General Counsel in an April 29, 2006 memorandum concerning unfair labor practice charges filed during first contract negotiations, a figure referenced in my written submission. Specifically, the General Counsel's memorandum stated that "Charges alleging that employees refused to bargain are meritorious in more than a quarter of newly certified units (28 percent)." In fact, from fiscal year 2002 through fiscal year 2005, unfair labor practice charges were filed in 925 of the 5,483 new bargaining situations, resulting in a 17 percent figure, rather than 28 percent. The merit rate for such charges was 44.4 percent during the years fiscal year 2002–2005, and fell to 37.25 percent in fiscal year 2007. Details are set forth in the attached memorandum.

Second, Senator Harkin noted that he had been informed that 32 percent of all election petitions filed in 2007 failed to result in an actual election, and he questioned why. I explained that I did not have the relevant data with me, but would subsequently provide it. As reflected in the attached memorandum, the discrepancy between the number of petitions filed and elections conducted is due in large part to the alternative disposition of many petitions, primarily as a result of voluntary withdrawals of petitions by the parties or administrative dismissals for various reasons (such as an inappropriate unit or lack of the required 30 percent showing of interest to support an election petition).

Third, the committee requested data regarding the breakdown of election types during fiscal year 2007. That information is also included in the attached memorandum, which reflects that there were a total of 2,009 elections conducted during the fiscal year, the vast majority of which were either RC (representation) case initial elections or RD (decertification) case initial elections.

Finally, the committee noted the frustration expressed by some of the agency's constituents regarding the statistical information (or lack thereof) maintained by the agency. We share that concern. The attached memorandum briefly discusses the agency's computer case management system and the data gathering challenges we face with our existing technology and resources. However, as the memorandum also explains, we are in the process of developing a new database management system to be deployed in the relatively near future. That system should provide the agency with the ability to provide more general information, including statistical data, to Congress and the general public.

MEMORANDUM

April 28, 2008.

To: The Board
From: Ronald Meisburg, General Counsel
Subject: Statistics

You have requested that I respond to certain questions addressed to you during the Hearings conducted on April 2, 2008, before the Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies. Additional questions were later communicated to you by committee staff and you have requested that I provide answers to those questions as well. The inquiries concern statistics that are maintained in the Case Activity Tracking System (CATS), the system we use to manage the case load and staffs of the Regional Offices.

One statistic requiring clarification concerns the merit rate for charges alleging employer unfair labor practices during bargaining for an initial contract after the election or recognition of a labor organization. A "merit" charge is one in which the Regional Director determines that it is either appropriate to issue a complaint or approves a settlement.

In Memorandum GC 05–06 "First Contract Bargaining Cases," I stated that charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly-certified units (28 percent). That number assumed that each meritorious charge was filed in a different new bargaining relationship. However, multiple meritorious charges, which may vary in their severity and impact, are filed in some new bargaining relationships, and none in others. Taking the latter factor into account, we have now determined that from fiscal year 2002 through fiscal year 2005, there were meritorious unfair labor practice charges filed in 925 of the 5,483 new bargaining relationships that arose during that period. Thus, such charges were filed in 17 percent of new bargaining relationships, rather than the 28 percent cited in Memorandum GC 05–06.

I am currently preparing a report on the First Contract Initiative that will make the change noted above and will update other information contained in Memorandum GC 06–05. That memorandum should be completed shortly and will be released to the public. It will also report a reduction in the merit rate for all first contract bargaining charges from 44.4 percent in the years fiscal year 2002–2005 to 37.2 percent in fiscal year 2007. The merit rate for all unfair labor practice cases in 2007 was 36.6 percent, so that the first contract case merit rate, at least for fiscal year 2007, was roughly comparable to the merit rate for our caseload overall. During the 2002–2005 period, almost one-half of charges alleging that employers refused to bargain occurred in the initial contract bargaining stage. For fiscal year 2006 through fiscal year 2007, this figure dropped to 25 percent.

It is still much too early to determine the causes of this drop in the merit rate. They may only be aberrations or they may be, in part, an effect of our reduced "R" case intake. I believe, however, that our special commitment to protect the initial bargaining process has had some effect on these numbers. Indeed, in my view, the consideration and use of injunctive relief under section 10(j) and the pursuit of special remedies for unfair labor practices committed during negotiations of initial contracts have sent a clear message of the agency's commitment to protecting freely-chosen collective bargaining.

I would also like to bring to the Board's attention a change in a previously reported 2007 statistic—the number of initial elections. In my Summary of Operations for fiscal year 2007, I reported on Office of the General Counsel performance based on preliminary statistical reports. In that memorandum, I reported that 2,080 initial

representation elections had been conducted during fiscal year 2007. Further review of the data indicates that number is 2,009.

The Committee has also requested a breakout of all elections conducted in fiscal year 2007. The total number of all types of elections conducted in fiscal year 2007 was 2,063. This includes 2,009 initial elections, broken down as follows:

1,562 RC (representation) Case Initial Elections
367 RD (decertification) Case Initial Elections
21 RM (employer-filed) Case Initial Elections
59 UD (union security deauthorization) Case Initial Elections

The remaining elections were rerun elections (49) (elections conducted after initial election results are set aside because of objectionable conduct) and run-off elections (5) (second elections conducted when the results of initial elections are inconclusive, e.g., tied elections where there is more than one union).

During the hearings, the Committee noted that a total of 3,056 petitions were filed in fiscal year 2007 (2,302 RC, 92 RM, and 662 RD) and asked what happened to the petitions that did not result in elections. Most of the difference between the number of petitions filed and the number of elections conducted in fiscal year 2007 is the result of alternative dispositions of the petitions: petitions withdrawn (985 petitions); petitions dismissed (98 petitions); and petitions blocked by unfair labor practice cases (41 petitions).

There is also always some additional discrepancy between the number of elections conducted and the number of petitions filed during a particular year because some elections conducted at the beginning of the year will be held based on petitions filed in the preceding year and some petitions filed late in the year will be resolved by elections held in the succeeding year.

Finally, a word about CATS and our information technology program and the goals thereof. As you know, CATS is a computer database for case management. Planning for this system began in the mid-1990s and it was initially deployed in 2000. It has been utilized since by regional and headquarters managers to ensure the timely and efficient processing of unfair labor practice and representation cases in our regional offices. Information on the face of an unfair labor practice charge or representation petition form is entered into CATS upon the docketing of the matter in a Region. Additional information pertinent to the processing of the case is later entered into data fields in the CATS program by staff in the Regions or in headquarters as the matter progresses through the case handling process. There are approximately 400 fields in the screens that are available to record case activity information relevant to an unfair labor practice case alone. Although not every field will be utilized in every case, many of the fields receive data during the course of the processing of the average case. The database is "dynamic," in that it changes every time a new case handling activity is entered into the system. Each of the agency's 51 field offices enters, updates, and corrects its casehandling data on a daily basis.

As seen above, there will sometimes be differences in the numbers reported with respect to NLRB case handling activity over time. Occasionally these differences are attributable to the dynamism of the system and on other occasions it is the result of the erroneously entered data. We make a great effort to keep our data as error free as possible by means of regular "data integrity" exercises that cross-check and verify the data. These exercises are accomplished with the use of computer programs designed for that purpose. We also conduct visual review of the CATS entries of a randomly selected sample of cases undertaken in conjunction with the quality review of case files by managers in our Division of Operations-Management in Washington.

Despite all these efforts there are some errors. Indeed, this is principally a by-product of so many transactions being entered at 51 different locations by at least 51 agency personnel. Nonetheless, we generally seek and achieve an error rate of less than 1 percent. While any error rate is regrettable, this low error rate ensures that we are able to manage our workload and deliver timely case processing. Very, very infrequently we do not meet that goal and the statistic on the number of elections conducted in fiscal year 2007 (discussed above) was such a situation as the difference of 71 elections represents an error rate of 3.4 percent. I am pleased to note that our data integrity program did catch and correct this error.

CATS is the successor to what was called the Case Handling Information Processing System (CHIPS), which for many years was the source of the case datautilized to manage the caseload and staffing in our Regional Offices. CHIPS was preceded by an earlier partially automated system. All of these systems were and are designed to aid us in the management of our work. They do not seek to provide statistical analysis of labor management issues. The statutory prohibition against "economic analysis" by the agency has always made us reluctant to have a

case information system that analyzed our cases beyond that necessary to manage the workload.

I am advised, however, that in developing CATS former General Counsel Fred Feinstein did direct that the system include information about first contract bargaining unfair labor practices and unfair labor practices arising during organizing campaigns. The information provided here about first contracts is a result of that action. As to the number of unfair labor practices during organizing campaigns, we discovered last year that not every Regional office had been entering this information as they were supposed to. When this was discovered, I directed that careful attention be paid to this statistic and that Regions go back and enter the appropriate data so that we would have full year statistics for cases closed in fiscal year 2007. As a result, I can report that 2,056 unfair labor practice charges or 1,552 unfair labor practice "situations" involving organizing were closed in fiscal year 2007.[1] Approximately 40 percent of these closed "situations" were meritorious cases that resulted in settlement or compliance, providing $9,969,615 in back pay to 1,643 individuals. In these situations, 163 employees accepted reinstatement, 107 declined reinstatement offers, and 140 waived offers of reinstatement.

As the Board knows, we are currently in the process of developing a new database management system that will succeed CATS. The vision for this project is to build an enterprise-wide, common case management platform using the latest technologies for interfacing with the public and managing cases across the NLRB's offices in an automated, efficient and transparent way. The Next Generation Case Management system will enable the NLRB to replace or optimize manual, paper-based processes and "stovepipe" legacy systems with a standards-based solution leveraging Commercial Off-The-Shelf tools and a Service-Oriented Architecture approach. Testing of the first phase of the new system is currently being conducted in two regional offices and in the Office of the General Counsel in Washington. Agency budget constraints have to some extent dictated the pace at which necessary hardware, software and contract developer services, required for agency-wide rollout of the Next Generation system, can be acquired. Nonetheless, I am optimistic that this new system will be operational by 2010. Given the advanced nature of this system, we should be able to provide more general information about our cases to Congress and the public.

It is our desire to provide Congress with whatever statistics it desires us to keep, consistent with our statutory authority to collect and disseminate data. We welcome the input of the Board and the Committee in identifying what, if any, additional information would be useful to you and them.

Mr. SCHAUMBER. It may be, but I'm not certain, that the 25 percent figure is the total number of charges filed arising out of first contract negotiations but does not represent, if you will, the bargaining scenarios; that is, within any one first contract bargaining, there could be multiple ULPs, there could be ULPs filed over a period of time. So, we don't know how many individual certifications are impacted. That may or may not be the explanation.

Of course, where employees do seek to bargain, the agency has a variety of remedies in its arsenal which I have outlined in my written statement. It is true that first contract bargaining tends to take longer than successor negotiations. That stands to reason. The bargaining may begin in an atmosphere of harsh feelings. This, I might add, is not entirely dissimilar from bargaining that can take place after a corporate campaign which results in an employer executing a neutrality card check agreement.

In addition, the employer may be unfamiliar with collective bargaining and his obligations under it. The parties don't know one another and they have to establish bargaining procedures and core terms and conditions of employment which may make negotiations protracted and difficult. Much of this framework can then be taken for granted in talks for successor contracts.

[1] "Situations" are groups of unfair labor practice charges involving the same parties, the same set of circumstances, and the same underlying disputes.

The fact that initial contracts take longer than successor ones or that parties do not reach agreement does not in my mind evidence a failure on the part of the Board to implement the act's requirement that the parties meet and bargain in good faith.

As the Supreme Court stated some 38 years ago, it was never intended that the government would step in, become a party to the negotiations and impose its own version of a desirable settlement.

In my statement, I outlined different initiatives which the agency has taken to expedite elections and facilitate first contract negotiations. I won't repeat those now, but I want the committee to know that the agency is not asleep, that it is trying its best and even though our record with regard to election petitions, I believe, is impressive, we're trying to shorten the time even further and we are also taking consistent and vigorous positions with respect to misconduct which occurs during first contracts.

In conclusion, as I hope I have shown, the Board is successfully and efficiently carrying out its statutory mandate. We are continuing to find new and different and frequently better ways of investigating, processing, litigating and deciding cases and conducting elections.

The agency's accomplishments, gauged by almost any statistical measure, have been impressive and they are a testament to the dedication and diligence of our employees. We frequently hear that regardless of the facts, the matter is one of perception, that the agency and the statute are hopelessly broken and inefficient.

I respectfully disagree. If there is a misperception, then our focus should be on correcting that misperception through communication and outreach efforts, not compounding that misperception by denigrating the Board. I hope to help correct that this morning.

In my view, both the agency and the NLRA have proven to be remarkably flexible and adaptive over the years. Once again, I can give many examples of that adaptability, if the committee is interested.

I note that some commenters have suggested that the radical decline in union density in the private sector since 1954 can be attributed to an increase in employer misconduct, deficiencies in the act and the alleged lack of vigorous enforcement under Republican administrations.

My response is that there is no convincing scientific or statistical data to demonstrate any such causal connection. Indeed, the frequently cited statistics about the increase in employer unfair labor practices and the prevalence of discrimination during organizing campaigns have been called into question by a number of scholars, information which I have with me.

In my view, the issue is far more complex and nuanced. There are multiple factors, social, economic, financial, and attitudinal, that have nothing to do with the act, the Board or employer misconduct, that have contributed significantly to this decline in union density. This is supported by the fact that unionization is in decline in most Western democracies.

PREPARED STATEMENT

I do not believe that either the act or the Board is perfect. However, I believe both have effectively and efficiently served to protect the rights of American workers for many years.

This concludes my statement. I would be pleased to answer any of your questions.

Senator HARKIN. Thank you, Mr. Schaumber.

[The statement follows:]

PREPARED STATEMENT OF PETER C. SCHAUMBER

INTRODUCTION

On behalf of myself and my esteemed colleague, Member Liebman, I want to thank Chairman Harkin, ranking member Specter, and all of the members of this committee for inviting us to testify today on the vitally important issue of safeguarding workers' rights. Senator Specter, I want particularly to thank you for your longstanding and consistent support of the National Labor Relations Board. Your example in this regard inspires all of us who work to make the promise of the National Labor Relations Act a reality.

A little over 5 years ago, I had the honor and privilege of becoming a Member of the NLRB. Two weeks ago, I received the added honor, and responsibility, of being designated by the President to serve as the Board's Chairman. Just to give you a little background, I began my legal career as a local prosecutor. I then served as an Assistant U.S. Attorney for the District of Columbia and as Associate Director of a Law Department Division in the Office of the Comptroller of the Currency before entering private practice, where I primarily engaged in federal trial and appellate litigation. Before joining the Board, I served for a number of years as a labor arbitrator.

You have invited us today to discuss two topics: (1) the Board's representation-election procedures, and (2) first contract negotiations in those instances in which employees have exercised their right to designate a collective bargaining representative. I will address those subjects and do my best to answer your questions concerning them. Preliminarily, however, it has long been a tradition of the Board that its sitting Members avoid commenting on legislative proposals to amend the Act or on matters pending before the Board. This tradition is intended to preserve our role as impartial arbiters of labor-management disputes under the act, and I will respectfully adhere to it in my testimony.

The NLRB is an independent Federal agency created by Congress in 1935 to administer the National Labor Relations Act (NLRA or Act), the primary law governing relations between unions and employers in the private sector. A cornerstone of the NLRA, as amended in 1947 by the Taft-Hartley Act, is the principle and practice of workplace democracy. That is, employees have the right to engage in, or to refrain from, organizing activities, and to express their choice on representation in an atmosphere free from coercion. The Board's paramount purpose is to insure that those rights, guaranteed in section 7 and implemented in sections 8 and 9 of the act, are fully realized. The facts and figures that I will present this morning will show that the Board's record in achieving these goals is an exemplary one.

THE NLRB'S REPRESENTATION CASE PROCESS

Though many of this committee's members are familiar with the Board's representation case process, it may be helpful to briefly outline some general statutory principles and how the system works in practice.

First, as the Supreme Court has emphasized, "[t]he act is wholly neutral when it comes to [the] basic choice" of employees to choose or reject union representation.[1] That is, the act guarantees employees the right to make their own informed judgments about the benefits of union representation and collective bargaining. Although employees are permitted to choose union representation through other means, the act ensures that employee free choice may be tested through secret ballot elections, which both the courts and the Board have frequently acknowledged as the preferred and most reliable means of determining employee sentiment.[2]

[1] *NLRB* v. *Savair Mfg. Co.,* 414 U.S. 270, 278 (1973).

[2] *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 602 (1969); *Underground Service Alert,* 315 NLRB 958, 960 (1994).

The Board's electoral process—or, more precisely, its representation process—is described in section 9 of the act. Section 9(a) sets forth the principles of majority rule and exclusive representation. Section 9(b) deals with the determination of the unit of employees in which an election will be held—that is, an "appropriate" bargaining unit. Section 9(c) details the actual representation process, from the filing of an election petition through the post-election certification of the employees' choice.

The representation process begins when a petition is filed with one of the Board's regional offices. The two most frequently filed petitions are RC and RD petitions. RC petitions seek an election to certify a union as the unit employees' bargaining representative. RD petitions seek an election to decertify a union. RM petitions, which are filed by the employer, may be filed if an employer receives a demand for recognition from a union, or if the employer is reasonably uncertain whether an incumbent labor organization continues to enjoy majority support.

After a representation petition is filed, it officially becomes a "case"—a representation or "R" case. Consistent with the primacy of elections in the scheme of the act, the Board gives such cases a high priority. The Agency's goal is to conduct an election within a median of 42 days of the filing of the petition. Thus, when a petition is filed, the regional office promptly assigns a Board agent to process it, generally on the very day the petition is filed. The Board agent contacts the parties and investigates certain threshold issues, including jurisdiction, possible bars to an election (such as outstanding unremedied unfair labor practices), a union certification or earlier valid election within the preceding year, and the sufficiency of the showing of employee interest in support of the petition (30 percent). In the course of this investigation, the agent attempts to convince the parties to agree on an appropriate unit as well as on the date, time, and location for the election. Typically, over 90 percent of pre-election issues are resolved through agreement of the parties.

In those relatively few cases where the parties do not reach agreement on the pre-election issues, the region conducts a pre-election hearing. After hearing the evidence and reviewing the parties' briefs, the Regional Director issues a decision either directing an election in an appropriate unit or dismissing the petition. Any party may request review by the Board of the Regional Director's decision. Section 102.67(c) of the Board's Rules and Regulations prescribes standards that the Board applies in deciding whether to grant or deny such a request for review. The Board's goal is to act on a request for review within 14 days of its filing. If review is granted, the record of the pre-election hearing is transmitted to the Board, and the parties have 14 days to file briefs. Meanwhile, however, the election usually goes ahead as planned, and the ballots are impounded pending resolution of the issue or issues under review.

During the election, the parties and the Board agent may challenge the eligibility of particular individuals who seek to vote, and those ballots are impounded. After the election, the Board agent tallies the uncontested ballots and immediately communicates that tally to the parties. The parties have 7 days to file objections to the election. If no objections are timely filed, and if any challenged ballots are insufficient in number to change the election outcome, the Regional Director issues a certification of election results (if the union has lost) or a certification of bargaining representative (if the union has won). If there are objections or enough challenged ballots to potentially affect the outcome, the region conducts an investigation and, if necessary, a hearing before a Hearing Officer, after which briefs may be filed. The Regional Director then issues a decision resolving the objections and/or challenges. Parties may appeal these post-election decisions to the Board.

THE AGENCY'S PERFORMANCE

Representation cases

By any definition, the agency is successfully carrying out its statutory mission to administer the representation procedures authorized under section 9 of the National Labor Relations Act.

In fiscal year 2007, 2,302 RC petitions, 662 RD petitions, and 92 RM petitions were filed, for a total of 3,056 representation petitions. Of the 2,302 RC petitions filed, elections occurred in 2,030 cases. As stated above, the Agency has established as one of its overarching goals to conduct elections within a median of 42 days of petition-filing. We exceeded that goal in fiscal year 2007: the median number of days from petition to election was 39 days, with 93 percent of all elections being conducted within 56 days.

These results were achieved in part because mutually agreed-upon stipulated pre-election agreements were reached between the union and the employer in the vast majority of cases—91.2 percent in fiscal year 2007. In the 186 cases in which there

was no stipulated election agreement, Regional Directors held hearings and issued pre-election Decisions and Directions of Election (D&DE). Even there, however, 93.9 percent of D&DEs were rendered within 36 days of petition filing. That is 36 days to hold the hearing, to obtain briefs from the parties, to review the record and briefs, and to write the Regional Director's decision. Now that, I submit, is prompt action.

The results of elections held in fiscal year 2007 show that the union was successful a majority of the time. Employees chose a collective bargaining representative in 59.2 percent of RC elections, 35.1 percent of RD elections, and 33.3 percent of RM elections, for an overall union success rate of 50.4 percent. That rate has increased in the first five months of fiscal year 2008. During that time, the NLRB has held 737 representation elections, of which unions won 57.1 percent, with 94.6 percent of elections held within 56 days.

In 2007, objections or challenges were filed in only 155 elections. Of that number, some were withdrawn and 127 required decisions by a Regional Director. Of those 127, 55 were decided after investigation and without a hearing; 73, after a hearing. The median number of days from the filing of objections or challenges to the issuance of a Regional Director's decision was 25 in non-hearing cases, 61 in hearing cases.

Parties can also request Board review of a pre-election Decision and Direction of Election, and they can file a post-election appeal to the Board from a Regional Director's or Hearing Officer's report on objections or challenged ballots. In fiscal year 2007, fewer than one-half of 1 percent (.04 percent) of the total number of representation cases processed by the Regional Offices—numerically, 224 cases—were appealed to the Board. Specifically, there were 113 pre-election requests for review. The Board denied review in 96 of these cases in a median time of 14 days. There were 111 post-election appeals filed. The Board issued decisions in 105 of these cases in a median time of 131 days. The Agency resolved 78.83 percent of all representation cases within 100 days.

Unfair labor practice cases

The Board's exemplary track record in processing representation cases provides an incomplete picture, however, of the Board's overall effectiveness in protecting worker's rights under section 7 of the act. After all, the employee's right to make an informed election choice is realized only if it is exercised in an atmosphere free of intimidation and coercion. Furthermore, when a collective bargaining representative has been freely chosen by the employees, the Board vigorously enforces the obligations of the parties to meet and bargain in good faith and, when necessary, acts to protect the union's majority status from unlawful denigration by the employer.

As the following data show, the Board's overall record in processing all unfair labor practice cases is quite impressive.

First, the big picture. From fiscal year 2002 through fiscal year 2007, the Board issued almost 500 cases a year. As of the end of fiscal year 2007, the median number of days an unfair labor practice case had been pending at the Board was 181; for representation cases, the median was 88 days. As of the same date, the Board had reduced its backlog to 207 cases—a reduction of some 66.5 percent over 5 years. The Board is at the lowest case inventory level in over 30 years. Granted, a lower intake of cases helped in this effort, but so did the very hard work of the agency's many dedicated public servants.

The NLRB seeks to serve the public quickly, efficiently, and fairly. In the overwhelming number of cases, this objective is achieved. To illustrate, about one-third of unfair labor practice charges filed with the Agency are determined, after investigation, to have merit. Most of these investigations are completed in about 77 days. The other two-thirds of the cases are withdrawn or dismissed, usually for lack of merit or insufficient evidence.

Where settlement of meritorious cases could not be achieved, complaint issued in a median of 98 days from the date of the charge in fiscal year 2007, and a median of 89 days thus far during fiscal year 2008. Stated differently, in about 12 weeks, the Agency is able to complete intake, docket, investigate, and determine, from among the thousands of charges filed (more than 22,000 in fiscal year 2007), which cases warrant further proceedings and which do not.

In fiscal year 2007 and for the first 5 months of fiscal year 2008, the Board was able to resolve, through settlements, about 97 percent of those cases determined to be meritorious. Absent settlement, cases go to hearing before an Administrative Law Judge, where the attorney representing the General Counsel presents evidence to try to prove the allegations of the complaint. The judge hears the evidence, resolves disputes in the testimony between witnesses, identifies the legal issues, reviews the parties' briefs, and issues a decision, which then can be appealed to the five-Member

Board in Washington. In about one-third of the judges' decisions, compliance is achieved without the need for further review. The other two-thirds—again that is of the 3 percent of all meritorious charges—are appealed to the Board for resolution.

Once the Board decision has issued, an aggrieved party may seek review in the U.S. Courts of Appeals. That occurred in 119 Board cases in fiscal year 2007, and 42 cases during the first 5 months of fiscal year 2008. The Board's enforcement rate on appeal has been outstanding. In fiscal year 2007, appellate courts enforced 97 percent of the Board's decisions in whole or part. For the first five months of fiscal year 2008, the Board prevailed in whole or part in 91 percent of the cases. Further appeal to the Supreme Court is possible, but happens in only a minute number of cases.

In terms of time and efficiency, the NLRB's administrative process works extraordinarily well in the overwhelming number of the cases filed with our regional offices. For the 2 percent of the cases that reach the Board for decision, the vast majority issue within a reasonable time. However, the process does occasionally bog down. Several cases have languished at the Board for unconscionable periods, although not infrequently for reasons (e.g., turnover among Board Members, multiple court remands) beyond the Agency's control. Regrettably, these few instances of inefficiency[3] often become the standard against which the Board is judged. That is not only misleading as a matter of fact, but it does a great disservice to the agency's dedicated and talented employees.

The Board's success in enforcing the act and achieving monetary remedies for employees is also worthy of note. In bottom-line terms, in fiscal year 2007 the NLRB collected $110,388,806 in backpay and obtained reinstatement offers for 2,456 employees. During the first 5 months of fiscal year 2008, the agency has collected $30,156,630 in backpay and obtained reinstatement offers for 666 employees. Over the past 5 years, the agency has recovered a total of $604 million in backpay, fines, and reimbursement of fees and dues, with 13,279 employees offered reinstatement.

FIRST CONTRACT NEGOTIATIONS

The NLRA and Board and court precedent establish a number of principles applicable to collective bargaining generally, including bargaining for initial contracts. For example, employers and unions must meet and bargain in good faith and at reasonable times. Similarly, the duty to bargain includes a duty to provide, upon request, information that is relevant to subjects of bargaining. The act also precludes abusive conduct, direct dealing with employees, or other behavior designed to undermine a union's status as the employee's designated representative. The act does not, however, compel parties to reach agreement on any contractual provision, and the Board has no authority to interject itself into the bargaining process or to impose what it believes would be a desirable agreement. See, e.g., *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970), in which the Supreme Court observed that the Board is without power to compel an employer and a union to agree and, when agreement is impossible to achieve, "it was never intended that the Government would step in, become a party to the negotiations and impose it own version of a desirable settlement."

However, the Board does have the authority to and will intervene when an employer engages in conduct designed to delay, undermine, or frustrate bargaining, such as:

—Refusing to meet at reasonable times and/or places.
—Surface bargaining or bargaining in bad faith.
—Making unexplained regressive proposals.
—Denigrating the union or engaging in direct dealing.
—Refusing to provide the union with information.
—Making unilateral changes in terms and conditions of employment.
—Declaring impasse prematurely and implementing its proposals.
—Refusing to execute an agreement reached in negotiations.

In such circumstances, where a violation is found, the Board has wide latitude to order remedies designed to bring the parties back to the table and to restore the bargaining relationship. Among the remedies available to the Board are the following:

—Ordering a party to cease and desist from unlawful conduct.
—Ordering the wrongdoing party to bargain in good faith.
—Requiring bargaining to occur on fixed, reasonable schedules.
—Extending the "certification year" period during which the union's majority

[3] The cases in which the Board has failed to meet its case processing goals under the Government Performance and Results Act (GPRA), only represent about one-half of 1 percent of the total number of cases the Agency receives.

status cannot be challenged.
—Requiring the prompt production of information that is necessary and relevant to negotiations.
—Requiring the restoration of unilaterally changed terms and conditions.
—Awarding backpay to employees for losses resulting from unilateral changes.
—Awarding reinstatement and back pay to employees discharged for participating in the negotiation process.
—Reimbursement of bargaining costs.

In addition, although the Act does not require the parties to reach an agreement or authorize the government or a government-sponsored arbitrator to impose contract terms, the Act, a robust body of Board law, and economic realities all serve to exert pressure on the parties to reach prompt agreement. For example:

—Negotiations can be expensive and time consuming for both employers and unions and may detract from other imperatives (for the employer, providing goods and services; for the union, organizing new and servicing existing bargaining units).
—Subject to a few well-defined and narrow exceptions, once a union has been selected as the collective bargaining representative, the employer cannot make changes in terms and conditions of employment until it concludes an agreement or bargains to overall—not "issue by issue"—impasse.
—Having achieved the status of the employees' collective bargaining representative, unions have significant incentive to deliver on promises made during the campaign.
—Some unions voluntarily self-impose an economic incentive to reach prompt agreement by foregoing dues from newly-represented employees until a contract is reached.
—The employer may want to reach agreement in order to preserve employee morale and avoid a strike and its attendant economic consequences.
—The union will prefer to obtain a contract during the first year after its certification, during which it enjoys an irrebuttable presumption of majority support. If a contract is not reached, employees may become disgruntled and file a decertification petition after the certification year ends.
—Employers, recognizing all this, may be encouraged to bargain in good faith because a decertification petition can be blocked by charges that the employer failed to meet and bargain in good faith or that unlawful unilateral changes were made to terms and conditions of employment.

In short, the act and precedent arising thereunder provide a comprehensive scheme of rules, principles, and remedies to regulate, safeguard, and facilitate collective bargaining. Ultimately, however, the Act does not compel agreement, and whether and what terms are actually reached is primarily a function of the incentives just outlined and the parties' respective economic leverage.

It is true, as FMCS and other data indicate, that first contract negotiations tend to be more protracted and contentious than successor negotiations. However, there are many reasons for that, most of which have nothing to do with the Board's election processes. A union new to a bargaining relationship obviously needs time to seek information and to understand the nature of the employer's business operations and the issues important to its members. The parties need to engage in the time-consuming process of developing detailed proposals on the many and various terms and conditions of employment that will form the framework for successor agreements. Parties also generally will be testing the flexibility, economic leverage, and pain thresholds of their bargaining partners for the first time. Unions may have made unrealistic promises during the course of the campaign to secure employee support, making agreement difficult or impossible. In short, initial contract negotiations frequently do require more time than successor negotiations, but that fact is hardly surprising, and does not, in my view, necessarily demonstrate any statutory deficiency or failure on the part of the Board.

It is also interesting to note that while a not insignificant percentage of the refusal-to-bargain unfair labor practice charges filed with the Board involve conduct occurring in first-contract negotiations (43.63 percent in 2005, 24.29 percent in 2006, and 25.68 percent in 2007), such cases still represent a relatively small percentage of the RC certifications in which meritorious charges are found (between 12.83 percent and 19.79 percent between fiscal year 2002 through fiscal year 2007).

AGENCY INITIATIVES TO EXPEDITE ELECTIONS AND FACILITATE FIRST CONTRACT NEGOTIATIONS

As noted earlier, for many years the agency has given representation-election cases a high priority. Our rules and regulations in such cases are specifically de-

signed to facilitate rapid processing of election petitions and the certification of election results. Various general counsels, under Republican and Democratic administrations alike, have refined those procedures and instituted and enforced tight deadlines for virtually every stage of the election process. On the Board side, the Agency established a specialized unit—the "R-Unit"—solely devoted to resolution of representation-case issues, and we have implemented practices and procedures to ensure that such cases are resolved expeditiously. For example, whereas the Board typically processes most unfair labor practice cases through a "subpanel" system in which members of the Board participate through their staff representatives, the Board considers and decides representation cases under what we call the Superpanel system. Under that system, R-Unit cases are expeditiously briefed and presented to a panel of the members themselves for discussion and decision there and then. For the most part, that system results in immediate decisions, which are communicated promptly to the Regional Offices and parties. During my tenure at the Board, I can state unequivocally that each of the Board Members with whom I have served has demonstrated an absolute commitment to rapidly processing our representation cases. Indeed, the agency's overall success in rapidly processing R cases has been outstanding, as discussed more fully above.

In addition to the existing structural and procedural steps taken to expedite the election process, the Agency has recently undertaken several new initiatives to respond to contentions, however questionable as a matter of fact, that the Board's election machinery moves too slowly.

The first initiative is the Board's website and expanded outreach efforts. Some commentators have complained that employees are often unaware of their rights under the NLRA or how to go about seeking representation. The Board's website, which has received accolades for its breadth of information and easy accessibility, provides easy-to-understand and comprehensive guidance to employees about the rights protected by our statute and the process of seeking workplace representation. Assuming we have the budget resources to devote to it, we hope to continue to expand and develop our website and outreach efforts.

The second recent initiative was the GPRA initiative instituted last year by my predecessor and colleague, Chairman Robert Battista. Under that initiative, the Board Members and Agency attorneys worked feverishly and, in my view, extremely collaboratively to reduce our inventory of older cases and to achieve our case processing objectives. Although we fell just short of meeting our unfair labor practice case GPRA goals, we did meet all of our representation case GPRA objectives. I am committed, notwithstanding the fact that we are now down to only two Members, to continuing many of the practices and approaches employed during last year's GPRA push.

The third recent initiative is the expanded use of technology. The Agency is in the midst of revamping our case processing, document management, database and Internet technologies. We have instituted electronic filing in a number of areas, and are in the process of expanding that program. On the Board side, we have a new software system for managing our caseload and tracking decisions through to issuance. On an Agency-wide basis, we envision having in place a seamless system that will permit all cases, including representation cases, to move quickly through each stage of the process in a paperless environment. A year ago, we began building an enterprise case management system, which will take another 2–3 years to complete, depending upon our funding.

An additional expansion of our use of technology in the representation case arena is the Video Testimony Pilot Program. Under this program, to speed up the processing of pre- and post-election hearings, the Agency is utilizing, in appropriate cases, video testimony, rather than incurring the expense and delay of bringing in witnesses from remote locations. We envision that programs of this type will make the Board's resources more accessible and will permit cases to be processed more efficiently.

A fourth recent initiative is the proposed "RJ" petition, which has been published for notice and comment in the Federal Register. This petition would provide a mechanism allowing a union and employer to file a joint petition for an election within 28 days of the filing of the petition. The petition would include an agreed-upon election date, description of the bargaining unit, payroll period for eligibility, and Excelsior list (identifying the employees in the bargaining unit). There would be no requirement for a showing of interest, and any party seeking to intervene would have to do so within 14 days. Unlike the current system, in which blocking charges (alleging unfair labor practices) may delay the election, such charges would instead be resolved through post-election proceedings. Lastly, under the RJ petition, all election and post-election matters would be resolved with finality by the Regional Director. Although we recognize that the RJ petition in its current form raises a number

of issues that will need to be resolved, if adopted in some form the RJ petition would address many of the frequently-raised complaints about the Board's existing election process.

Two final recent initiatives, instituted by General Counsel Meisburg, are focused on (1) ensuring that employees have freedom of choice based on a timely opportunity to vote in Board-conducted elections in an uncoerced atmosphere, and (2) protecting the choice of employees who have elected union representation while first contract negotiations are ongoing. General Counsel Meisburg has issued two recent memoranda outlining a comprehensive program intended to protect new bargaining relationships and to foster accord on collective bargaining agreements. That program is described in detail in two General Counsel Memoranda, appended hereto as exhibits A and B. In brief, under this initiative, the General Counsel is closely monitoring and aggressively pursuing injunctive relief and special remedies in cases involving employer unfair labor practices during either union organizing campaigns or first contract negotiations. Among the special remedies the General Counsel is asking the Regions to consider are requiring bargaining on a prescribed or compressed schedule; requiring periodic reports on bargaining status; imposing a minimum six-month extension of the certification year; and reimbursement of bargaining costs.

CONCLUSION

As I hope the foregoing demonstrates, the Board is successfully and efficiently carrying out its statutory mandate. We are continuing to find new and different, and frequently better, ways of investigating, processing, litigating, and deciding cases and conducting elections. The agency's accomplishments, gauged by almost any statistical measure, have been impressive, and are a testament to the dedication and diligence of our employees. We frequently hear that, regardless of the facts, what matters is the perception that the agency and the statute are hopelessly broken and inefficient. I respectfully disagree. If there is a misperception, then our focus should be on correcting that misperception through communication and outreach efforts, not compounding that misperception by denigrating the Board. In my own view, both the agency and the NLRA have proven to be remarkably flexible and adaptive over many years. The Board and the Act continue to effectively protect and to serve the American worker. Can both be improved? Undoubtedly. But the assertion that the Board and the NLRA are failing in their mission ignores, in my view, an undeniable record of success and accomplishment that spans the decades since the statute's enactment.

This concludes my statement. I would be pleased to answer your questions.

EXHIBIT A.—OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 06–05

April 19, 2006

TO: All Regional Directors, Officers-in-Charge, and Resident Officers
FROM: Ronald Meisburg, General Counsel
SUBJECT: First Contract Bargaining Cases

An important priority during my term as General Counsel will be to ensure (1) that employees have freedom of choice based on a timely opportunity to vote in Board-conducted elections in an uncoerced atmosphere and (2) that their decision in an election is protected by this Agency.

Initial contract bargaining constitutes a critical stage of the negotiation process because it forms the foundation for the parties' future labor-management relationship. As the Federal Mediation and Conciliation Service has observed, "[i]nitial contract negotiations are often more difficult than established successor contract negotiations, since they frequently follow contentious representation election campaigns." [1] And when employees are bargaining for their first collective bargaining agreement, they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative.[2] Indeed our records indicate that in the initial period after election and certification, charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly-certified units (28 percent). Moreover, of all charges alleging employer refusals to bargain, almost half occur in initial contract bargaining situations (49.65 percent). In addi-

[1] 57 FMCS Ann. Rep. 18 (2004).

[2] *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 373 (11th Cir. 1992). Accord: *Ahearn* v. *Jackson Hospital Corp.*, 351 F.3d 226, 239 (61h Cir. 2003).

tion, half of the section 10(j) cases involving categories 5 and 8, which deal with unfair labor practices that undermine incumbent unions, involve parties bargaining for first contracts.

In order to protect these new bargaining relationships, and therefore protect employee free choice, I am asking the Regional Offices to focus particular attention on remedies for violations that occur during the period after certification when parties are or should be bargaining for an initial collective bargaining agreement. As a major part of this remedial initiative, I want Regional Offices to consider two types of potential relief in cases involving initial contract bargaining violations: (1) Section 10(j) relief and (2) special remedies as part of the Board's order. I understand that these types of cases are sometimes not easy to prove, but I am committed to making the principle of employee free choice meaningful, and I ask for your input and support.

Concerning section 10(j) relief, courts have long recognized the need for interim relief to protect the representational choice of employees. The agency frequently has obtained temporary injunctions in cases involving violations of section 8(a)(1), (3), and (5) during the period after certification. For example, in 2005, Region 29 successfully litigated a 10(j) case where, during negotiations for a first contract, the employer engaged in surface bargaining, discharged the union steward, and made promises of wage increases and promotions that were conditioned on employees voting to decertify the union. In another initial contract bargaining case in 2004, Region 20 won an injunction against an employer who engaged in surface bargaining, refused to provide requested information to the union, threatened employees with job loss, and discharged two open union supporters. Thus, the section 10(j) program historically is well positioned to promote effective initial contract bargaining.

Special remedies can also be appropriate for unfair labor practices committed during initial contract bargaining. Regional Offices should routinely consider the possibility for special remedies for such cases, including seeking a new full certification year, notice reading and publication, union access to bulletin boards, and other means of communication. Other remedies could include periodic reports on the status of bargaining, and bargaining and/or litigation expenses.

The prelude to these first bargaining cases is the election, and we must do all in our power to assure that employees are able to vote promptly in elections in an atmosphere free from all unlawful interference and coercion. If interested parties must wait for a Board order to remedy violations committed during an organizing drive in order to have a fair election, the union's and the employer's right to conduct their respective campaigns will likely have been severely eroded, and the employees' right to make a fully informed choice on representation will likely have been undermined. Therefore, section 10(j) relief should be considered in organizing campaign cases, especially where the union has filed an RC petition that is blocked by meritorious unfair labor practice charges. An interim injunction may restore the laboratory conditions needed to proceed to a timely election, pave the way to such an election, and even obviate the need for a Gissel bargaining order. In deciding whether §10(j) relief is appropriate in this type of case, Regional Offices should determine whether the organizing union is prepared to file a request to proceed to an election if the Board obtains appropriate 10(j) relief.

Finally, in order to assure consistent analysis and use of appropriate remedies in union organizing and initial contract bargaining cases, Regional Offices should submit the following cases for advice, with a copy to Operations-Management, for a 6-month period ending on October 20, 2006:

1. All cases where Regional Directors have found merit to section 8(a)(1), (3), or (5) or 8(b)(1)(A) or 8(b)(3) allegations after a union has been certified as the bargaining representative of a unit and the union has requested bargaining for an initial collective bargaining agreement.[3] The Regional Office should submit a memorandum that combines its analyses and recommendations concerning (1) what special remedies, if any, may be appropriate and (2) whether or not Section 10(j) relief is appropriate.

2. All meritorious cases where a union is actively engaging in an organizational campaign and the unfair labor practice activity has undermined employees' right to make a free and informed choice. These cases should be submitted for Section 10(j) consideration, with the Region's recommendation as to whether or not interim relief is appropriate.

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[3] "Test of certification" section 8(a)(5) cases should not be submitted. Rather, consistent with our Agency goals, they are to be processed as quickly as possible by means of summary proceedings. See OM 04–25, "Test of Certification Bargaining Order Summary Judgment Cases," February 12, 2004.

If the Regional Office is recommending that section 10(j) relief be authorized, it should submit the standard memorandum consistent with past practice. If the Regional Office is recommending against the authorization of section 10(j) relief, it should submit a short memorandum explaining the basis for its recommendation and attaching the decisional documents (field investigative report, agenda outline, agenda minute) and the complaint. In first contract bargaining cases, these memoranda also should include a recommendation and analysis regarding the need for special remedies.[4]

If you have any questions concerning this initiative, please contact the Division of Advice. I greatly appreciate your efforts to accomplish the goals identified in this memorandum.

R.M.

EXHIBIT B.—OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07–08

May 29, 2007

TO: All Regional Directors, Officers-in-Charge, and Resident Officers
FROM: Ronald Meisburg, General Counsel
SUBJECT: Additional Remedies in First Contract Bargaining Cases

In GC Memorandum 06–05, I set forth a remedial initiative dealing with first contract bargaining cases intended to ensure that employees have freedom of choice on the issue of union representation, free of coercion by any party, and that their decision is protected by this Agency. As noted there, initial contract bargaining constitutes a critical stage of the negotiation process in that it provides the foundation for the parties' future labor-management relationship. Unfair labor practices by employers and unions during this critical stage may have long-lasting, deleterious effects on the parties' collective bargaining and frustrate employees' freely-exercised choice to unionize. For these reasons, GC Memorandum 06–05 instructed Regions to consider section 10(j) relief and special remedies in first contract bargaining cases, and to submit to the Division of Advice all cases where Regional Directors found merit to post-certification section 8(a)(1), (3), or (5), or 8(b)(1)(A) or 8(b)(3) allegations.

Our experience with these cases under GC Memorandum 06–05 has led me to conclude that additional remedial measures should be undertaken to adequately protect employee free choice in initial bargaining cases. This memorandum sets forth additional remedies that should regularly be considered in cases where unfair labor practices occur during first contract bargaining. By this memorandum, I am also extending for another 6 months the directive to submit all cases that involve violations during organizing campaigns or first contract bargaining to the Injunction Litigation Branch of the Division of Advice with a Regional recommendation on whether section 10(j) relief is appropriate.

I. THE NEED FOR ADDITIONAL REMEDIES IN INITIAL CONTRACT BARGAINING CASES

Where there are bad faith bargaining tactics or other violations in the initial bargaining process that substantially delay or otherwise hinder negotiations, merely ordering the parties to bargain may not return the parties to the status quo ante. I believe that additional measures are often necessary in these situations to truly restore the conditions and the parties' relationships to what would have existed absent the violations. With this object in mind, I instructed Regions in GC Memorandum 06–05 to consider special remedies in initial bargaining cases, such as seeking extension of the certification year, notice reading and publication, union access to bulletin boards, periodic reports on the status of bargaining, and bargaining/litigation expenses. Based on our experience under this remedial initiative, I have concluded that certain remedies specifically tailored to restore the pre-unfair labor practice status quo, make whole the affected parties, and promote good-faith bargaining should regularly be sought in initial bargaining cases where violations have interfered with contract negotiations.

The Board has in the past imposed remedies which, if uniformly applied, could assist in returning the parties to the pre-unfair labor practice status quo. The Board considers these remedies to be extraordinary relief, and has traditionally focused in

[4] A Region need not submit merit cases in which the parties agree to a bilateral settlement before complaint issues.

its analysis on the egregiousness of the respondent's conduct, rather than the impact of the violations on employees' section 7 rights and the collective-bargaining relationship. I believe that, in first contract bargaining cases, the primary focus should be on the need to restore the status quo and on tailoring make-whole remedies to restore the process of collective bargaining at this critical stage. Therefore, although the Board has so far applied additional remedies only occasionally, and then based on the egregiousness of the violations, we should seek them, and argue their necessity, based on the impact of the violations on the new collective-bargaining relationship.

In identifying which first contract bargaining cases may warrant additional remedies, Regions should focus on the effect of the unfair labor practices, whether committed by employers or by unions, on the bargaining process and the parties' relative bargaining strengths. Regions should consider whether first-contract bargaining violations are likely to irrevocably stymie the bargaining process by unduly delaying negotiations, unlawfully increasing the bargaining expenses of the other party, undermining the union's support, or otherwise causing a decline in a party's bargaining strength. High impact violations during first contract bargaining may include:

—Outright refusals to bargain or overall bad-faith bargaining that may be tantamount to a repudiation of the bargaining relationship.

—Refusals to meet at reasonable times, the use of bargaining agents without adequate bargaining authority, refusals to provide information that is critical for negotiations to proceed, or other tactics that prolong bargaining. By causing undue delay in negotiations, these violations unlawfully increase the other party's bargaining expenses and eventually erode their bargaining strength.

—Unilateral changes that inject extraneous issues into the negotiations. These unlawfully created issues distract from the legitimate issues dividing the parties at bargaining, making it more difficult for the parties to achieve a contract. Unilateral changes may also force unions to bargain from a position of disadvantage, render the unions powerless in the eyes of unit employees, and tend to erode employee support for the union at a time when the union has not had adequate opportunity to establish a strong relationship with the represented employees.

—Unlawful discharges of union supporters. Discharges may also significantly hamper negotiations by removing key supporters from the workplace where they serve as a source of information and communication between the unit and the Union. Discharges that involve employee-negotiators may impact bargaining not only by removing key individuals from the bargaining unit, but also by discouraging other employees from stepping into the discriminatees' bargaining role.

The probable result of these high-impact violations is a seriously damaged collective-bargaining relationship that is less likely to achieve the good-faith bargaining necessary to reach a first contract.

II. APPROPRIATE ADDITIONAL REMEDIES

The serious harm to the collective-bargaining process that may result from violations such as those committed during initial contract bargaining warrant remedies beyond the standard bargaining order. I believe that the remedies discussed below can directly and effectively address the consequences of bad-faith bargaining and other violations during first contract negotiations so as to more adequately restore the pre-violation conditions and relative positions of the parties. Accordingly, they should be considered by Regions in all appropriate cases:

1. Requiring Bargaining on a Prescribed or Compressed Schedule

Specific bargaining schedules have been used against recidivist employers, particularly in contempt proceedings, to bring them into compliance with their bargaining obligations. In this context, the Board, with judicial approval, has alternatively demanded that the parties meet at reasonable consecutive intervals,[1] for a minimum number of days per week,[2] or for a minimum number of hours per

[1] See, e.g., *NLRB* v. *Johnson Mfg. Co. of Lubbock*, 511 F.2d 153, 156 (5th Cir. 1975); *NLRB* v. *Metlox Mfg, Co*., 1973 WL 3146 (9th Cir. Apr. 18, 1973).

[2] See, e.g., *Straight Creek Mining. Inc*. v. *NLRB*, 2001 WL 1262218 (6th Cir. May 11, 2001) (ordering bargaining at least one day per week); *NLRB* v. *H&H Pretzel Co*., 1991 WL 111249 (6th Cir. June 25, 1991) (three days per week).

week,[3] until an agreement or good-faith impasse is reached. These specific-schedule bargaining orders go further than traditional bargaining orders to minimize the potential for further delay, and help to secure a meaningful opportunity for bargaining.

These scheduled bargaining orders have not been generally sought in unfair labor practice complaints. Where they have been sought, administrative law judges or the Board have rejected them without substantive discussion.[4] Nevertheless, I believe that these scheduled bargaining orders directly address the problem of improving the diminished chances of a bargaining unit attaining a first contract where there has been unlawful delay and bad-faith tactics. A specific bargaining schedule provides an effective and unburdensome means of improving employees' chances of achieving a first contract. While the exact nature of the bargaining schedule requested may vary depending on the particular circumstances of the case and will be determined in consultation with the Division of Advice, in recommending specific bargaining schedules in first contract bargaining cases Regions[5] should consider the types of bargaining schedules granted in contempt situations.

2. Periodic Reports on Bargaining Status

In GC Memorandum 06–05, I discussed remedies requiring the respondent to provide to the Board periodic reports on the status of bargaining. While I believe that requiring bargaining according to a prescribed schedule will help to remedy the consequences of bargaining delays in initial contract bargaining, as discussed above, the additional requirement of periodic reports on bargaining status may be appropriate in cases where there is a reasonable concern that the respondent will repeat its unlawful conduct. It may be an appropriate remedy, for example, where the respondent has previously violated a Board order or settlement agreement.

3. A Minimum Six-Month Extension of the Certification Year

It has long been Board policy to ensure that newly-certified unions have the opportunity to focus solely on bargaining for at least one full year.[6] To that end, the Board will not allow a union's majority status to be challenged within one year of certification in order to provide the union with "a reasonable period in which it can be given a fair chance to succeed."[7] Consequently, where an employer's unfair labor practices delay good-faith bargaining during that period, the Board retains the discretion to extend the certification year.[8] Although the Board sometimes exercises its discretion to extend the certification year for a full 12 months, even where there may have been some period of good faith bargaining,[9] Ait frequently rejects such an extension.[10] Rather, the Board considers the context of any particular refusal to bargain in deciding whether to grant a certification year extension, and if so, for how long, particularly taking into account "the nature of the violations; the number, extent, and dates of the collective bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations."[11]

The Board has recognized, however, that when unlawful bargaining has isrupted the bargaining relationship, parties need a reasonable period of time to resume their

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[3] See, e.g., *NLRB* v. *Schill Steel Prods*., 480 F.2d 586, 598 (5th Cir. 1973) (15 hours, unless the union agreed to less).

[4] See, e.g., *People Care, Inc*., 327 NLRB 814, 827 (1999); *Professional Eve Care*, 289 NLRB 1376, 1376 fn. 3 (1988).

[5] See cases cited above, fns. 1–3.

[6] *Brooks* v. *NLRB*, 348 U.S. 96, 101–03 (1954); *Kimberly Clark Corp*., 61 NLRB 90, 92 (1945).

[7] *Centr-O-Cast*, 100 NLRB 1507, 1508 (1952) (quoting *Franks Bros. Co*. v. *NLRB*, 321 U.S. 702, 705 (1944)).

[8] *Mar-Jac Poultry Co*., 136 NLRB 785, 786–87 (1962).

[9] *Northwest Graphics, Inc*., 342 NLRB 1288, 1289–90 (2004), enfd. mem. 156 Fed.Appx. 331 (D.C. Cir. 2005) (citing *Glomac Plastics*, 234 NLRB 1309 fn. 4 (1978), enfd. in rel. part 592 F.2d 94, 101 (2d Cir. 1979)).

[10] See, e.g., *St. George's Warehouse*, 341 NLRB 904 (2004) (extension of certification year not warranted where employer committed section 8(a)(5) violations but did not engage in surface bargaining); *Mercy, Inc*., 346 NLRB No. 88, slip op. at 3–4 (2006) (granting only a 3 month extension where the record contained no explanation as to why the union did not seek bargaining during the first 10 months of the certification year); *United Electrical Contractors Assn*., 347 NLRB No. 1 (2006) (certification year extended only for a "reasonable period" after employer failed to provide relevant information).

[11] *Mercy, Inc*., 346 NLRB No. 88, slip op. at 3 (citing *Northwest Graphics*, 342 NLRB at 1289; *Wells Fargo Armored Services Corp*., 322 NLRB 616, 617 (1996). Current Board members have emphasized that "the length of such an extension is not necessarily a simple arithmetic calculation." *Northwest Graphics, Inc*., 342 NLRB 1289. See also *id*. at 1291 (Chairman Battista, in dissent, stating that an extension's length "is not necessarily to be decided by arithmetic reasoning")

relationship.[12] Accordingly, it has often granted 6-month extensions to remedy unlawful bargaining even where there has been lawful bargaining for more than 6 months during the certification year. In keeping with this approach, Regions should routinely seek minimum certification year extensions of 6 months in cases where unlawful bargaining in first contract negotiations disrupted the relationship, even where this may require overall bargaining for more than 12 months. I believe 6 months is the minimum time necessary to reestablish a solid initial bargaining relationship that has been undermined by the effects of the illegal bargaining tactics. At the same time, extending the period by 6 months, as opposed to a full year, would adequately accommodate employees' right to seek to decertify a union they no longer want to represent them. Certification year extensions of 6 months generally should be particularly valuable, especially when combined with prescribed bargaining schedules that may require more bargaining in a shorter timeframe.

Of course, in cases where there has been no meaningful bargaining post-certification, or where the unfair labor practices have eliminated any progress made during any period of good-faith bargaining, we will continue to seek 12-month certification year extensions to return the parties to the status quo ante.

4. Reimbursement of Bargaining Costs

The Board has ordered respondents in bad-faith bargaining cases to reimburse the other party for bargaining costs in order to restore the status quo ante. However, the Board has limited this remedy to cases of "unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies."[13] The Board has applied this standard to both employers[14] and unions[15] that engaged in bad-faith bargaining, where there was deliberate misconduct that was "calculated to thwart the entire collective-bargainirig process and forestall the possibility of the Respondent ever reaching agreement."[16] Reimbursed costs have included employee negotiating committee members' lost wages and union agents' salaries, as well as mileage, meals, and lodginp expenses incurred by the bargaining representatives in getting to the bargaining table.[17]

Under this rationale, reimbursement of bargaining costs is particularly appropriate where violations that amount to a complete repudiation of the employee-chosen bargaining relationship occur at a time when that relationship has not had an opportunity to establish itself and employees' relationship with their chosen union is in a nascent stage.[18] Due to the especially vulnerable status of a new collective-bargaining relationship, such unfair labor practices necessarily "infect the core of the bargaining process" to such an extent that their effects cannot be remedied by a mere bargaining order.

However, as mentioned above, I believe that the appropriate focus should be not on the egregiousness of the violations, but on the effect they have on the bargaining relationship and need for true make-whole relief. Thus, the critical factor in cases involving violations during first contract bargaining is that the violations cause the other party to waste resources in futile bargaining or efforts to enforce the bargaining obligation at a time when the new bargaining relationship is most vulnerable. These unlawfully-imposed costs may have long-lasting effect on the affected party's economic strength.

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[12] See, e.g., *Colfor, Inc*., 282 NLRB 1173, 1175 (1987), enfd. 838 F.2d 164 (6th Cir. 1988) ("It is unreasonable to conclude that these parties could resume negotiations at the point where they left off over 2 years ago, or that fruitful negotiations could take place during a mere 2 months of bargaining after such a hiatus."); see also *Beverly Health and Rehabilitation Services*, 325 NLRB 897, 902–03 (1998), enfd. 187 F.3d 769 (8th Cir. 1999) (granting 6 month extension despite 9 months of good faith bargaining during the certification year); *Dominguez Valley Hospital*, 287 NLRB 149, 151 (1987), enfd. 907 F.2d 905 (9th Cir. 1990) (same).

[13] *Dish Network Service Corp*., 347 NLRB No. 69, slip op. at 53 (2006) (quoting *Unbelievable, Inc*., 318 NLRB 857, 859 (1995), enforcement denied in part 118 F.3d 795 (D.C. Cir. 1997)).

[14] *Regency Service Carts, Inc*., 345 NLRB No. 44, slip op. at 8–9 (2005).

[15] *Teamsters Local Union No. 122*, 334 NLRB 1190, 1194–95 (2001), enfd. mem. 2003 WL 880990 (D.C. Cir. Feb. 14, 2003).

[16] *Unbelievable, Inc*., 318 NLRB at 858.

[17] See, e.g., *NLRB* v. *Newton-New Haven Co*., 1979 WL 4857 (2d Cir. June 18, 1979); *NLRB* v. *Mr. F's Beef and Bourbon*, 1977 WL 4297 (6th Cir. Aug. 29, 1977); *NLRB* v. *Johnson Mfg. Co*., 511 F.2d 153, 157 & fn. 4 (5th Cir. 1975).

[18] It is well established that newly certified unions are very vulnerable to employer misconduct. See generally *Arlook* v. *S. Lichtenberg & Co*., 952 F.2d 367, 373 (11th Cir. 1992), and *Ahearn* v. *Jackson Hospital Corp*., 351 F.3d 226, 239 (6th Cir. 2003). A bargaining order alone will not overcome the harm to the union, and its ability to reach a first contract, which result from employer failures to bargain in the critical post-election period.

Although the Board has stated that it "do[es] not intend to disturb the Board's long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations[,]"[19] Aa bargaining order alone may be insufficient to restore the status quo ante where cumulative illegal tactics significantly stall a newly-formed bargaining relationship.[20] bargaining order alone will not make up for the unlawful costs on the affected party, who is forced to expend time and resources arranging, planning for, and participating in fruitless meetings. In such circumstances, reimbursement of bargaining costs is necessary to restore the parties to their lawful pre-violation position and fully counter the effects of the violations on employees' ability to reach an agreement. Where the investigation discloses bad-faith bargaining from the outset, we will seek negotiation costs for the full period of negotiations, rather than confining the requested order to the 6 month 10(b) period.[21]

III. SUBMISSION OF CASES TO THE DIVISION OF ADVICE

In order to assure consistent analysis and application of these additional remedies in initial contract bargaining cases, Regional Offices should submit to the Division of Advice all cases involving unfair labor practices during bargaining for, or attempts to bargain for, an initial contract. Because our prior experience has shown that section 10(j) injunctive relief is often the most effective means of preventing potentially irreparable harm to bargaining relationships and restoring the lawful status quo ante, am also directing the Regions to include in their submission their recommendation regarding section 10(j) relief. Finally, our review of cases submitted for section 10(j) consideration under our prior memorandum has led us to conclude that cases involving breaches of first contract settlement agreements are particularly appropriate subjects for Section 10(j) relief.

In short, for a period of 6 months after the date of this Memorandum, Regions should submit to the Division of Advice, with a copy to Operations-Management:

1. All meritorious cases involving unfair labor practices during bargaining for, or attempts to bargain for, a first contract.[22] Regional submissions to the Division of Advice should include a summary of the violations to be alleged, a discussion of the impact of the violations on the bargaining relationship, the Region's recommendation on which, if any, of the additional remedies discussed herein are appropriate and why, and the Region's recommendation on whether section 10(j) relief is appropriate.

As was the case with GC Memorandum 06–05, if the Region is recommending that section 10(j) relief be authorized, it should submit the standard "go" 10(j) recommendation memorandum. If the Region is recommending against both 10(j) and any of the remedies discussed here, it should submit a short memorandum explaining the basis for its recommendation and attach the decisional documents (field investigative report, agenda outline, agenda minute) and the complaint. Recommendations to seek the final remedies discussed here should be treated as standard Advice submissions, including the parties' positions, if any, on the recommended remedies.

2. In continuation of GC Memorandum 06–05, all meritorious cases where a union is actively engaged in an organizing campaign and the unfair labor practice activity has undermined employees' right to make a free and informed choice should be submitted for Section 10(j) consideration, with the Region's recommendation on whether injunctive relief is appropriate.

3. In crafting their recommendations regarding section 10(j) relief for cases in either of the above categories, Regions should be cognizant that cases where there has been a breach of a settlement agreement may be particularly appropriate vehicles for injunctive relief.

R.M.

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[19] *Regency Service Carts*, 345 NLRB No. 44, slip op. at 9 (citing *Unbelievable, Inc.*, 318 NLRB at 859).

[20] In contrast, where parties have been able to continue negotiations, despite an employer's unlawful unilateral changes, the Board has found that reimbursement of negotiating costs was not appropriate. *Visiting Nurse Services of Western Mass.*, 325 NLRB 1125, 1133 (1998), enfd. 177 F.3d 52 (1st Cir. 1999).

[21] The Board recently has indicated that this could well be appropriate in cases where "it may not be readily apparent until long after the negotiations have begun that bargaining has been in bad faith from the inception." *Recency Service Carts*, 345 NLRB No. 44, fn. 14.

[22] A Region need not submit test of certification cases or other merit cases in which the parties agree to a bilateral settlement before complaint issues.

Senator HARKIN. Now, I'll turn the testimony to Ms. Liebman and then, as I said, it will be made a part of the record and if you would summarize, we would appreciate it.

STATEMENT OF HON. WILMA B. LIEBMAN, MEMBER, NATIONAL LABOR RELATIONS BOARD

Ms. LIEBMAN. Thank you. Good morning, Chairman Harkin, ranking member Specter.

Thank you for inviting me to testify this morning about the National Labor Relations Board and its activities.

As you know, members of the Board have a tradition of not discussing legislative proposals to amend the National Labor Relations Act. With your indulgence, I will abide by that tradition today.

I have served on the Board for more than 10 years now, and I am certainly aware that our statute is old and getting older. One scholar has said that American labor law is ossified. It has not been revised in a major way for more than 60 years.

In the meantime, our society and the global economy have been transformed. It is fair to ask whether labor law is still working. Does law actually make it possible for workers who want to be represented by a union and who want the benefits of collective bargaining to achieve those ends? As income and equality rises, some people think not.

Nearly 25 years ago, a leading labor law scholar lamented that contemporary American labor law more and more resembles an elegant tombstone for a dying institution. Since then, the percentage of American workers who belong to unions has continued a steep and steady decline. The most recent membership figure for the private sector is 7.5 percent.

Meanwhile, in the past decade, the Board has experienced a dramatic and unprecedented decline in case filing, affecting both unfair labor practice charges, down 31 percent between 1997 and 2006, and representation petitions, down 41 percent during that same time period.

In my view, this steep drop reflects a loss of confidence in the Board and its processes, and I say that with regret because I have the greatest respect for this agency and for its history.

More and more unions are seeking to negotiate recognition in the workplace rather than use the Board's election machinery. The Board's procedures are seen as taking too long, leaving workers vulnerable to coercion by employers and generating campaign animosity that can taint a new bargaining relationship.

It is hard to argue with this perception. Under current law, unions have limited access to workers on the job, while employers have great freedom to get their message across. Firing employees to nip union organizing in the bud is nothing unusual but remedies are weak.

Of course, it is one thing for workers to win union representation and another thing for their new union to win a first contract from the employer. The difficulty of getting from an election victory to a collective bargaining agreement has long been recognized.

For example, the Dunlop Commission on the Future of Worker-Management Relations examined the problem in 1994. It pointed

out that one-third or more of newly-certified unions failed to reach a first contract. Why? The Dunlop Commission pointed to lingering animosity from the election process and to unlawful bad faith bargaining by employers.

New research on this subject is underway by scholars at the Sloan School of Management at MIT. It suggests that the first contract failure rate is going up and it, too, points to employer unfair labor practices as part of the problem.

It's notable that the MIT scholars point to a series of obstacles facing workers who want to engage in collective bargaining. In their metaphor, workers must pass through the eye of a needle not once but several times to get from the filing of an NLRB representation petition to winning a first contract.

As my written testimony details, the Board, at least in my dissenting view, is not doing everything it could to protect the collective bargaining process. In recent decisions, the Board has taken too narrow a view of what constitutes unlawful surface bargaining. It has been too willing to permit employers to withdraw recognition from unions when bargaining difficulties cause employees to lose faith, and it has been too stingy in granting full remedies when employers engage in bargaining misconduct after a union is certified.

PREPARED STATEMENT

I understand why the subcommittee would be concerned about the issues to be addressed at today's hearing and I would be happy to answer your questions.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF WILMA B. LIEBMAN

Chairman Harkin, ranking member Specter, and members of the subcommittee: Thank you for inviting me to testify today about the National Labor Relations Board (NLRB) and its activities.

I am pleased to appear before you today. I began my service on the Board more than ten years ago, in November 1997. Before joining the Board, I served for several years at the Federal Mediation and Conciliation Service (FMCS), first as Special Assistant to the Director and then as Deputy Director. I began my legal career as a staff attorney for the NLRB in 1974, and later served on the legal staffs of two labor unions, the International Brotherhood of Teamsters and the Bricklayers and Allied Craftsmen.

As you may know, consistent with their duty to impartially apply the law as it is, members of the NLRB have a tradition of refraining from discussions of legislative proposals to amend the National Labor Relations Act. I respect that tradition and will abide by it.

Nevertheless, I certainly know that the act is an aging statute, that it is under scrutiny, and that its interpretation by the Board has become controversial. Indeed, I recently have addressed the current state of labor law in Congressional testimony [1] and in published articles.[2] There, I observed that "that National Labor Relations

[1] On December 13, 2007, I testified at a joint hearing of Senate and House subcommittees, called to examine recent decisions of the NLRB. See Statement of Wilma B. Liebman, Member, National Labor Relations Board, before the Subcommittee on Employment and Workplace Safety, Committee on Health Employment, Labor and Pensions, United States Senate, and the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and Labor, United States House of Representatives on "The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights" (Dec. 13, 2007).

[2] See Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board,* 28 Berkeley J. Employment & Labor L. 569 (2007); Wilma B. Liebman, *Labor Law Inside Out,* 11 WorkingUSA: The Journal of Labor and Society 9 (2008).

Act, by virtually all measures, is in decline. . . .”[3] I cited the Board’s plummeting case intake, noting that “labor unions have turned away from the Board, and especially from its representation procedures” and pointing out that “[t]his disenchantment has intensified in recent years as the Board, in case after case, has narrowed the statute’s coverage, cut back on its protections, and adopted an increasingly formalistic approach to interpreting the law.”[4]

Consistent with my previously-expressed views—but without recommending any particular statutory changes or commenting on pending legislation—I would welcome comprehensive re-examination of a law that has not been substantially revised for more than 60 years. As one scholar puts it, American labor law is “ossified.”[5] Given the many changes in American society, and in the global economy, it seems desirable—whatever our policy preferences might be—to make sure that our labor law evolves and that the rights it protects do not become illusory.

I understand that the focus of today’s hearing is on the Board’s election procedures and initial collective-bargaining agreements, i.e., first contracts. The overriding aim of the National Labor Relations Act, a goal that was not renounced by the Taft-Hartley Act in 1947, is to equalize bargaining power between employers and employees by, in the words of section 1 of the statute, “encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment.”[6] To that end, it is fair to ask whether the act is working: whether the law actually makes it possible for workers who want to be represented by a union, and who want the benefits of collective bargaining, to achieve those ends.

As income inequality continues to rise,[7] there are troubling signs that the act is not working. And these signs are not new. Nearly 25 years ago, an eminent labor law scholar, Professor Paul Weiler of the Harvard Law School, lamented that “[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution.”[8] He pointed to the steady decline in the percentage of workers represented by unions, which he attributed, in large part, to the “skyrocketing use of coercive and illegal tactics . . . by employers determined to prevent unionization of their employees.”[9] Professor Weiler argued that our labor-law system was at fault, for permitting such tactics to succeed.[10] In 1983, when Professor Weiler’s article appeared, only 16.5 percent of private-sector workers belonged to a union. In 2007, the figure was even smaller: a mere 7.5 percent.[11] There are surely many reasons for this trend, but it seems obvious that our labor-law system is one important factor.

Notably, in the past decade, the Board has experienced a dramatic, and unprecedented, decline in case filings. In my view, this steep drop reflects a loss of confidence in the Board and its processes. (I say that with regret, because I have the greatest respect for the Agency and its history.) Between fiscal years 1997 and 2006 the number of representation petitions filed dropped from 6,179 to 3,637, a 41 percent decline. (From 2005 to 2006 alone, the representation case intake dropped by 26 percent.)[12] More and more, unions are seeking to negotiate recognition in the workplace, rather than use the Board’s election machinery.[13] The Board’s procedures are seen as taking too long, leaving workers vulnerable to coercion by employ-

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[3] Liebman, *Decline and Disenchantment,* supra, at 572.

[4] Id. at 571 & nn. 13–15.

[5] Cynthia Estlund, *The Ossification of American Labor Law,* 102 Colum. L. Rev. 1527 (2002).

[6] 29 U.S.C. §151.

[7] See, e.g., Greg Ip, *The Gap Is Growing Again for U.S. Workers,* Wall St. J., Jan. 23, 2004 (describing the declining power of unions as a factor in widening income disparities).

[8] Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization under the NLRA,* 96 Harv. L. Rev. 1769, 1769 (1983).

[9] Id. at 1770.

[10] Id. at 1771.

[11] The cited figures are drawn from the Current Population Survey conducted by the Bureau of Labor Statistics and are available in historical chart form (“Union Membership, Coverage, Density, and Employment Among Private Sector Workers, 1973–2007”) at www.unionstats.com.

[12] For the same period, unfair labor practice charges dropped from 33,439 to 23,091, a 31 percent decline. These statistics are drawn from the Board’s annual reports. *See Seventy-First Annual Report of the National Labor Relations Board for the fiscal year Ended September 30, 2006* 3 (Chart 1), available at www.nlrb.gov.

[13] See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms,* 90 Iowa L. Rev. 819 (2005).

ers, and generating campaign animosity that can taint a new bargaining relationship.[14]

It is difficult to quarrel with this perception. For example, union access to workers on the job is sharply limited under current law, which permits employers to exclude non-employees from their property under ordinary circumstances.[15] Employers, meanwhile, have great freedom to campaign against unionization, using means such as captive-audience meetings.[16] Although workers are often economically dependent on their employers, and so very sensitive to what they hear from the boss, the law permits employers to vocally oppose union representation, so long as they do not make threats or promises to employees.[17] Of course, what constitutes a threat is open to interpretation. In several recent decisions, for example, the Board (over a dissent) has permitted intimidating employer statements during organizing campaigns.[18] Worse, discharges of employees that are designed to nip organizing drives in the bud are nothing unusual,[19] while remedies for such unlawful firings are notoriously weak—and getting weaker.[20] Remedies that fail to make workers whole, and that fail to deter unlawful employer conduct, undermine the law's effectiveness. Unions, in turn, face special problems as the result of two recent, divided-Board decisions: In the Harborside case, the Board reversed precedent and made it easier to set aside a union's election victory, based on pro-union supervisory conduct (such as collecting signatures on union-authorization cards), even where the employer's anti-union stance is clear.[21] Because it is often difficult to determine whether a worker is, in fact, a statutory supervisor, Harborside creates a dilemma for unions in seeking supporters. That dilemma was compounded by the Board's Oakwood decision, which interpreted the statutory definition of a supervisor and expanded the universe of potential supervisors.[22]

It is one thing for workers to win union representation; it is another for their new union to win a first contract from the employer. In 1994, the Dunlop Commission, a blue-ribbon Federal advisory committee reporting to the Secretary of Labor and the Secretary of Commerce, examined this issue. It found that one-third or more of newly-certified unions failed to reach a first contract, a sharp increase from the earliest available estimate in the late 1950's, when the figure was 14 percent.[23] The Commission observed that "roughly a third of employers engaged in bad faith 'surface' bargaining with the newly-elected union representative," a factor that "significantly reduces the odds that employees will secure an initial agreement from their employer."[24] The Commission also pointed to the nature of union-representation elections, which it described as "highly conflictual for workers, unions, and firms"—meaning that "many new collective bargaining relationships start off in an environment that is highly adversarial."[25]

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[14] For a scholar's critical examination of representation procedures under the NLRA, see Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law,* 77 Minn. L. Rev. 495 (1993).

[15] See *Lechmere, Inc.* v. *NLRB,* 502 U.S. 527 (1992).

[16] Member Walsh and I cataloged some of the means available to employers in our dissent in *Harborside Healthcare, Inc.,* 343 NLRB 906, 917 & n. 14 (2004).

[17] See Section 8(c) of the National Labor Relations Act, 29 U.S.C. §158(c).

[18] *See, e.g., Medieval Knights, LLC,* 350 NLRB No. 17 (2007) (finding that consultant's statement that hypothetical employer could lawfully "stall out" contract negotiations was not threat that electing union would be futile); *TNT Logistics North America, Inc.,* 345 NLRB No. 21 (2005) (finding that supervisor's unsupported statement that employer would lose only customer if employees unionized was lawful expression of personal opinion); *Manhattan Crowne Plaza Town Park Hotel Corp.,* 341 NLRB 619 (2004) (finding that employer's statement recounting mass discharge of recently-unionized employees at another employer's hotels was not threat of reprisal); Curwood, Inc., 339 NLRB 1137 (2003) (finding that employer's letter stating that customers viewed unionization negatively was lawful).

[19] See, e.g., *California Gas Transport, Inc.,* 347 NLRB No. 188, slip op. at 8–9, 10–11 (2006) (discussing discharges and other violations designed to stop organizing drive), enfd. 507 F.3d 847, (5th Cir. 2007).

[20] See *St. George Warehouse,* 351 NLRB No. 42, slip op. at 11 (2007 (dissent) (discussing limitations of backpay remedy and dissenting from decision reversing precedent and placing burden on General Counsel to produce evidence concerning discriminatee's job search, when employer demonstrates availability of jobs).

[21] *Harborside Healthcare,* supra, 343 NLRB at 909–912. Member Walsh and I dissented.

[22] *Oakwood Healthcare, Inc.,* 348 NLRB No. 37 (2007).

[23] Commission on the Future of Worker-Management Relations (Dunlop Commission), *Fact Finding Report* 73 (May 1994), available at http://digitalcommons.ilr.cornell.edu/key__/276/. See also Commission on the Future of Worker-Management Relations, *Final Report* 44 (December 1994), available at http://digitalcommons.ilr.cornell.edu/key__/2/.

[24] Dunlop Commission, *Fact Finding Report,* supra, at 74.

[25] Dunlop Commission, *Final Report,* supra, at 38.

Accordingly, the Dunlop Commission "encourage[d] employers and unions who desire a cooperative relationship to agree to determine the employees' majority preference via a 'card check.' "[26] Under long-established law, an employer is free to recognize an employer voluntarily—rather than demanding that the Board conduct an election—if the union is able to demonstrate that it has uncoerced majority support among employees, typically by collecting signatures on authorization cards.[27] The Board, however, has recently created a new obstacle to voluntary recognition. The Board's Dana decision now requires employers who voluntarily recognize a union to post a notice informing employees that it has done so and telling them how they can get rid of the union.[28] That posting opens a 45-day window period during which employees—provided they marshal 30 percent support among their co-workers—may petition the Board for an election to decertify the union. Dissenting in Dana, Member Walsh and I pointed out that this new mechanism frustrates voluntarily-established bargaining relationships.[29] During the window period, unions will be under great pressure to produce results for employees, yet employers will have little incentive to bargain seriously, if they cannot be sure the relationship will continue. It is now debatable, then, whether voluntary recognition is still a "favored element of national labor policy."[30]

Meanwhile, new research on the difficulty of reaching a first contract is being conducted by John-Paul Ferguson and Thomas Kochan, scholars at the Sloan School of Management of the Massachusetts Institute of Technology. They point to the series of obstacles facing workers who want to engage in collective bargaining—in their metaphor, workers confront the difficulty of passing through not just one, but several, needles' eyes, beginning with the filing of an NLRB representation-election petition. Their preliminary study, based on data obtained from the NLRB and the FMCS, suggests that an election petition leads to a first contract in only 1 out of 5 cases.[31] Forty-four percent of newly-certified unions failed to win a first contract. Unfair labor practices significantly reduce the chances both of getting to an election and of securing a contract.

The Board's recent decision in Garden Ridge Management illustrates what can happen after a union's election victory.[32] There, the union won and began bargaining for a first contract. The employer repeatedly refused the union's requests to meet more often. Just over a year after the union was certified, with no contract reached, employees presented the employer with a petition saying they no longer wanted to be represented by the union. The employer promptly withdrew recognition. A Board majority found that the employer should have met more often with the union, but otherwise found that the employer had bargained in good faith and that it was free to stop recognizing the union. I dissented, arguing that the Board should use extra care in monitoring first-contract bargaining and that the evidence showed that the employer had never intended to bargain in good faith with the employer.[33] On that score, I cited statements made by the employer's officials before the election, telling employees that even if the union won, the employer would simply tie it up at the bargaining table indefinitely and would never reach an agreement. Under the circumstances, it was predictable that the union would lose support. Indeed, it seems that some labor consultants advise employers to go through the motions of bargaining, with no intention of reaching a contract, precisely so the union will lose support, essentially undoing its election victory.[34] Surface-bargaining

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[26] Id. at 42.

[27] *See, e.g., NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 596–597 (1969) (discussing history of voluntary recognition under NLRA Section 9(a), proving that representatives may be "designated or selected" by a majority of employees, without specifying means).

[28] *Dana Corp.,* 351 NLRB No. 28 (2007). Such a notice-posting requirement is unprecedented. Employers, for example, are not generally required to post notices to employees informing them of their labor-law rights. Only if the employer commits an unfair labor practice is notice-posting required, as part of the Board's remedial order.

[29] Id., slip op. at 14.

[30] *NLRB* v. *Lyon & Ryan Ford, Inc.,* 647 F.2d 745, 750 (7th Cir. 1981).

[31] See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004* (March 25, 2008) (unpublished working paper). See also Thomas A. Kochan, Updating American Labor Law: *Taking Advantage of a Window of Opportunity,* 28 Comparative Labor Law & Policy Journal 101, 111–112 (2007) (discussing data).

[32] *Garden Ridge Management, Inc.,* 347 NLRB No. 13 (2006).

[33] Id., slip op. at 5.

[34] See Martin J. Levitt, *Confessions of a Union Buster* 204–225 (1993). Describing his own experience as a consultant, Levitt writes: "The negotiation of a first contract is very delicate, so the process is highly controlled by labor law. Company executives who have just been forced to recognize a union—after spending tens of thousands of dollars to defeat it—rarely walk into their first bargaining session with open arms. . . . The purpose of the rules is to impede man-

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violations are hard to prove (as Garden Ridge illustrates) and hard to remedy effectively. An employer who has bargained in bad faith is simply ordered to cease-and-desist its unlawful conduct, to start bargaining in good faith, and to post a notice advising employees of what it has been ordered to do.[35] For an employer bent on continuing its campaign to defeat the union at the bargaining table, the deterrent effect is negligible.

The problem of achieving first contracts has not escaped the Government's attention. The Federal Mediation and Conciliation Service places special emphasis on first-contract negotiations, recognizing that such negotiations are "critical because they are the foundation for the parties' future labor-management relationship" and "are often more difficult than established successor contract negotiations, since they frequently follow contentious representation election campaigns."[36] (FMCS mediation is purely voluntary, of course.) I gained familiarity with this problem when I served at the FMCS.[37]

The NLRB's current General Counsel has followed suit, launching a remedial initiative that focuses on unfair labor practices that occur after a union is certified and bargaining for a first contract is, or should be, under way.[38]He has cited NLRB data showing that unfair labor practice charges alleging employer refusal-to-bargain "are meritorious in more than a quarter of all newly-certified units."[39] And he has observed that unfair labor practices during this "critical stage" may have "long-lasting deleterious effects on the parties' collective bargaining and frustrate employees' freely-exercised choice to unionize."[40]

Whether the initiatives of the FMCS and the NLRB General Counsel will make a difference, within the existing statutory framework, is an open question.

Unfortunately, the Board itself has not been as vigorous in protecting workers and unions from the effects of unfair labor practices committed during first-contract bargaining. Cases involving the remedy when employers fail to bargain in good faith with newly-certified unions are one example. By way of background: The doctrine known as the "certification-year bar" is designed to give unions a fair chance to succeed before their status can be challenged: for 1 year after a union is certified, an employer is required to recognize and bargain with the union, even if the union appears to have lost majority support among employees.[41] Without such an insulated period, the Supreme Court has observed, a union would "be under exigent pressure to produce hothouse results or be turned out."[42] As a corollary to this rule, the Board may extend the certification year, by as much as another 12 months, if the employer does not bargain in good faith.[43] As part of his current first-contract-bargaining remedial initiative, the General Counsel has emphasized the importance of seeking adequate certification-year extensions.[44] But, as the General Counsel notes, a divided Board has recently rejected such extensions in some cases.[45] I dissented in one of those cases (the only one in which I was on the panel), objecting to the majority's invocation of the statutory rights of employees who might oppose union representation. As I said there, "[w]e should not be so quick to vindicate the employ-

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agement from undermining negotiations. . . . As with most labor laws, however, the rules are largely ineffective. Worse, the hands of a union buster can quite easily twist those rules into a precision weapon against the union." Id. at 204.

[35] See, e.g., *Dish Network Service Corp.,* 347 NLRB No. 69 (2006).

[36] Federal Mediation and Conciliation Service, *Fifty-Seventh Annual Report* 18 (2004), available at www.fcms.gov.

[37] See John Calhoun Wells & Wilma B. Liebman, *New Models of Negotiation, Dispute Resolution, and Joint Problem Solving,* 12 Negotiation Journal 119, 124–125 (1996).

[38] NLRB General Counsel Memorandum GC 06–05, *First Contract Bargaining Cases* (April 19, 2006), available at www.nlrb.gov (endorsing use of section 10(j) injunctions and special remedies). See also NLRB General Counsel Memorandum GC 07–08, Additional Remedies in First Contract Bargaining Cases (May 29, 2007), available at www.nlrb.gov (endorsing additional remedies, including requiring bargaining on a prescribed or compressed schedule, requiring periodic reports on bargaining status, minimum 6-month extensions of the certification year protecting unions' representative status, and reimbursement of bargaining costs).

[39] General Counsel Memorandum GC 06–05, supra, at 1.

[40] General Counsel Memorandum GC 07–08, supra, at 1.

[41] See *Ray Brooks* v. *NLRB,* 348 U.S. 96, 101–103 (1954).

[42] Id. at 100.

[43] *See Mar-Jac Poultry Co.,* 136 NLRB 785 (1962).

[44] See General Counsel Memorandum GC 07–08, supra, at 4–5.

[45] Id. at 4 n. 10, citing *United Electrical Contractors Assn.,* 347 NLRB No.1 (2006) (rejecting extension of certification year, over dissenting view of Member Walsh); *Mercy, Inc. d/b/a American Medical Response,* 346 NLRB 1004 (2006) (rejecting full extension, over my dissent); *St. George Warehouse, Inc.,* 341 NLRB 904 (2004) (rejecting extension, over dissent of Member Walsh).

ees' right to refrain from union representation when we have not first vindicated the employees' initial choice of union representation."[46]

The Board's split July 2007 decision in Badlands Golf Course is another example.[47] That case involved an employer who had unlawfully withdrawn recognition from a union, after expiration of the certification year, but before a first contract had ever been reached. The Board ordered the employer to bargain, which it did, for 6 months and 3 weeks, before withdrawing recognition again. The issue posed was whether this withdrawal was lawful, under the Board's rule in Lee Lumber, a 2001 decision, which established a 6-month minimum insulated period, and 1-year maximum insulated period, for such remedial bargaining.[48] The Lee Lumber Board had emphasized that one important factor in determining the required period for remedial bargaining was whether the parties were negotiating a first contract.[49] "It is not unusual," the Board observed, for first-contract bargaining "to take place in an atmosphere of hard feelings left over from an acrimonious organizing campaign."[50] Although Badlands Golf Course involved first-contract bargaining, a single remaining contract issue, and the absence of a bargaining impasse, a Board majority permitted the employer to withdraw recognition from the union, finding that it had bargained for a reasonable period of time. The majority relied not only on bargaining conducted in compliance with the Board's initial order, but—remarkably—on the bargaining that culminated in the employer's first, and unlawful, withdrawal of recognition. Member Walsh and I dissented, arguing that the majority had erred in several respects, including by "grossly miminiz[ing] the fact that the parties were bargaining for an initial contract."[51]

As a Member of the Board, and a frequent dissenter in recent years, I have pointed out that the Board's decisions may exacerbate disenchantment with the Act. If employees and labor unions, for example, turn away from the Board because they lack confidence in it, then the Board's effectiveness is necessarily diminished. Even if I am not in a position to suggest what should be done, I fully understand why the subcommittee and the Congress would be concerned.

I would be happy to answer your questions.

Senator HARKIN. Well, thank you, both, very much. I would start with Mr. Schaumber.

The administration's taken actions recently to inform workers during organizing campaigns of how to withdraw financial support for a union and how to petition for decertification. That was an executive order.

Has the Board taken any action to inform workers of their rights to join a union or be involved in the process of organizing?

Mr. SCHAUMBER. Let me answer the question this way, Senator. Whenever there is an election notice, it contains a statement of rights. The Board has not issued a separate notice, apart from the election context, advising employees of their rights under the act.

A petition was filed by Professor Morris. It was filed many, many years ago. In fact, I think, although I could be incorrect, 15 to 17 years ago. It was never acted on by the prior Board or this Board. One of the reasons that it has not been acted on is that there is concern over the authority of the Board to issue such a notice-posting requirement.

The employment statutes which permit notice posting all contain a provision permitting it, except for the Fair Labor Standards Act. There's some peculiarity in that act. I don't recall exactly what it is, but there is a notice posting requirement under the FLSA but there is no expressed provision in the statute, but our statute does not contain a provision for notice posting.

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[46] *American Medical Response,* supra, 346 NLRB at 1007.
[47] *Badlands Golf Course,* 350 NLRB No. 28 (2007).
[48] *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002).
[49] Id. at 403.
[50] Id.
[51] *Badlands Golf Course,* supra, 350 NLRB No. 28, slip op. at 5.

I would say, however, we have developed a marvelous website. It has received accolades from many. It's very easy to use and employees who get on our website can very easily see what their rights are under the National Labor Relations Act, how they can file a petition, where they can file a petition, what regional office to go to.

Senator HARKIN. I'll get back to that. Mr. Schaumber, I've also been engaged in a lot of mine safety work in the last few years, so has Senator Specter. In that arena, Federal inspectors issue additional penalties for repeated violators of the law. Okay? That's under MSHA.

Has the Board taken any action to fine repeat violators and step in to prevent unfair labor practices from repeat violators?

Mr. SCHAUMBER. We do not have the authority under the act to impose fines. We have, however, imposed in certain situations bargaining costs where there has been surface bargaining or bad faith bargaining. We have on occasion imposed attorney's fees.

The Board does issue broad orders in connection with violations of the act by employers that are persistent and repeated. In addition, the general counsel side of the agency can go to court and seek a contempt citation when an employer violates a Board order.

Senator HARKIN. Does the act give you broad authority to prevent unfair labor practices? No?

Mr. SCHAUMBER. I believe it does.

Senator HARKIN. It does?

Mr. SCHAUMBER. Yes.

Senator HARKIN. Oh, yes.

Mr. SCHAUMBER. The authority we are given is authority to—the statute reads we can enter a cease and desist order ordering the employer or the union to restrain and stop the unfair labor practice and we can take such other affirmative actions as the Board deems appropriate, and the Board has over the years developed a variety of affirmative action which it takes in its order in order to rectify an unfair labor practice such as the reinstatement of employees. In 2007, the Board awarded approximately $110 million in back pay. It reinstated roughly 2,500 employees. Over the last 5 years, it has awarded approximately $604 or $640 million in back pay, and——

Senator HARKIN. Those are all nice big figures, but what it doesn't tell us is how many didn't have to pay back pay.

Mr. SCHAUMBER. Well, if we did not find a violation, there would be no order requiring the back pay.

Senator HARKIN. That's right, that's right. So, we have no—I don't have any statistical data regarding that, how many were filed, but you found no violation or something like that and we don't—I don't have any.

So, you tell me there's $604 million been recouped and that sounds like a lot of money, but we don't know what that means in the broad picture.

Mr. SCHAUMBER. Let me—maybe I can help in some way. Of the, for example, 22,000 charges which were filed in 2007, merit was found by the general counsel in roughly 35 percent of the cases. They went to complaint. Ninety-seven percent of those complaints were settled. In fact, I think the—so, it's a substantial settlement rate.

I'm aware, and I'm sure the Senator is concerned with respect to some of the cases that were cited by Member Liebman as cases with which she disagreed, and if I could comment on that very, very briefly.

The cases with which Member Liebman—I think there were four instances where she found that statements made by an employer should have been found by the Board to be intimidating and coercive, she perceived them as such. You know, it's a difficult—sometimes the facts are difficult, and it's not an easy question to answer in some cases.

Section 8(c) of the statute gives employers the right to express their views on unionization. The Supreme Court has said that section 8(c) implements the First Amendment——

Senator HARKIN. I understand.

Mr. SCHAUMBER [continuing]. And the—I could go through some of the facts, and I think, Senator Harkin, you may have some difficulty, too, as to where you would draw the line, but I also have with me a list of cases where Member Liebman and I and other Board members have been together in finding violations and I can assure the committee that for every one case that's been cited by my worthy colleague in dissent, there are many where we all have found violations.

Again, I have that list with me. I can supplement the record with it.

Senator HARKIN. Thank you, Mr. Schaumber. I'll get back to that, too.

Ms. Liebman, I just have one question. My time has basically run out for this round, but we'll have another round.

Is it true that employers right now can choose to recognize card check for union decertification cases? Let me repeat that. Employers right now choose to recognize a card check rather than an election for union decertification cases?

Ms. LIEBMAN. In other words, to get rid of a union?

Senator HARKIN. Yes.

Ms. LIEBMAN. Yes. We don't quite use that terminology, but yes, it is true under existing law and always has been the law that if an employer gets proof that the union has lost majority status, it gets actual proof of that, it is entitled to withdraw recognition from the union.

We don't call it decertify because only the NLRB certifies or decertifies, but it is entitled to withdraw recognition, if it is presented with evidence of a loss of majority status.

Senator HARKIN. What does that evidence consist of?

Ms. LIEBMAN. It could consist of a petition with employee signatures or cards and the union, if it has reason to believe the signatures were coerced, for example, or something like that, could file an unfair labor practice charge.

Senator HARKIN. Well, let me ask you this. If the employees—let's say that the employer sent around a petition and over—what do they have, over 50.1 percent?

Ms. LIEBMAN. Fifty percent, plus one.

Senator HARKIN. Fifty percent, plus one, two, two. I use decertify.

Ms. LIEBMAN. Yeah.

Senator HARKIN. Can the employees ask for a secret ballot in that case? Can they say, well, we'd like to have a vote and have a secret ballot on that?

Ms. LIEBMAN. Well, first of all, I think what you said is, "if the employer passed around the petition." The employer cannot circulate the petition. It's doomed and tainted—what we consider tainted—if the employer circulates it.

Senator HARKIN. Okay. All right.

Ms. LIEBMAN. But if—maybe alter the facts. If the employees were to circulate among themselves a petition and 50 percent plus one——

Senator HARKIN. Yes.

Ms. LIEBMAN [continuing]. Signed it and then the—somebody filed for an election. I guess I'm trying to figure out the scenario in which it would happen. Because in that scenario, where the union is recognized, either an employee would file to decertify the union or maybe another rival union would come in.

When the union's already recognized, the union doesn't have to go file to reaffirm its status, but if the employer withdrew recognition, the union, if it had proof of——

Senator HARKIN. What I'm getting to is let's say you have an employee, say goes around and gets 50 percent plus one to decertify the union. That's the word.

Ms. LIEBMAN. That's fine.

Senator HARKIN. Get rid of the union.

Ms. LIEBMAN. I understand what you mean.

Senator HARKIN. Who do they present that to? Who do they present that to?

Ms. LIEBMAN. They could file with the NLRB to get a decertification election——

Senator HARKIN. Okay.

Ms. LIEBMAN [continuing]. Or they could hand it to the employer.

Senator HARKIN. They could hand it to the employer.

Ms. LIEBMAN. Yes, and the employer, if it wanted to, could withdraw recognition, if it believed that that represented a majority.

Senator HARKIN. Withdraw recognition.

Ms. LIEBMAN. Or it could file itself a petition with the NLRB.

Senator HARKIN. So, the employer could remove recognition at that point?

Ms. LIEBMAN. Yes.

Senator HARKIN. At that point, could the employees—is there any right for the employees to have a secret ballot, say we don't—we think there was coercion by others to do this, can we have a secret ballot as to whether or not we want to continue our union representation?

Ms. LIEBMAN. I think the bottom line answer is yes, they could. The union, first of all, could file an unfair labor practice charge contending that there was coercion and that would have to be litigated.

If the employer withdrew recognition, the union could then file itself for an election to reassert its majority status. The employees, someone can correct me if I'm wrong, the employees have a right to file themselves if they want to decertify the union.

But I guess another—you could file a decertification petition just to have the union win that election, I suppose.

Senator HARKIN. Okay. Thank you.

Ms. LIEBMAN. I'm sorry if I confused the issue.

Senator HARKIN. Words, words, words.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. I note the harmonious relationship between Mr. Schaumber and Ms. Liebman, but in the event there were to be a disagreement with only two members present, the vote was 1 to 1 and it's a tie, what do you do? Flip a coin?

Mr. SCHAUMBER. I think it's fair to say that Member Liebman and I respect each other's views. We have been deciding cases. We agree, I think, roughly on 85 percent of the cases.

Senator SPECTER. Come to my question.

Mr. SCHAUMBER. The 15 percent——

Senator SPECTER. What do you do if there's a tie?

Mr. SCHAUMBER [continuing]. We put it aside. We cannot decide.

Senator SPECTER. That's a fairly big impediment to the Board functioning, isn't it?

Mr. SCHAUMBER. It is.

Senator SPECTER. Chairman Schaumber, you write in your written testimony that "several cases have languished at the Board for unconscionable periods, although not infrequently for reasons beyond the agency's control." Well, not infrequently but there have been some times within the agency's control.

But what would you think about a mandatory rule that the Board would have to issue a decision within 1 year of the judgment by the administrative law judge or regional director?

Mr. SCHAUMBER. As you know, Senator, we prefer not to respond to questions with regard to proposed legislation. However, this is really procedural, not substantive.

I think it's always—in my view, it seems to me it's always dangerous to put a statutory deadline in. There are some cases——

Senator SPECTER. Well, how about a rule within 1 year, unless there is a good reason which is explained by the Board to justify the term?

Mr. SCHAUMBER. I always think oversight is helpful, Senator.

Senator SPECTER. If it runs more than 30 days, say, justification. If you have to give a reason, there's more of an incentive to move ahead, at least there's some backstop. I'm glad to hear you say that that's not too bad.

Ms. Liebman, you write in your written statement that "remedies for unlawful firings are notoriously weak and getting weaker."

I note that the Board does have authority for injunctions. In 2006, the last year for which statistics are available, the Board chose to seek an injunction in only 25 cases. Injunctions are very effective. You go into court and you apply for an injunction and you produce evidence and you get the potential for a prompt ruling.

Why not more injunctions, Ms. Liebman?

Ms. LIEBMAN. Senator Specter, the procedure for the Board authorizing injunctive relief in cases like that is that we wait for the recommendations to seek injunctive relief to come to us from the

general counsel of the agency. The general counsel in turn gets these recommendations from the regional offices.

Senator SPECTER. Now whom does the regional office look to? How many steps are there here?

Ms. LIEBMAN. The regional office——

Senator SPECTER. The value of an injunction is that it's fast. If you have to play tennis, it could take forever.

Ms. LIEBMAN. You're absolutely correct, and in fact, the Dunlop Commission pointed out—did a contrast. The statute, in section 10(l), provides for mandatory injunctions in cases where it's alleged that a union has engaged in secondary boycott conduct and by contrast, section 10(j) just provides for permissive injunctive relief. So that's discretionary with the general counsel and the Board.

So already there's a distinction between the two types of injunctive relief in the statute.

Senator SPECTER. Well, it's discretionary, but how about a little muscle behind the discretion? If you're complaining about remedies, wouldn't injunctive relief solve a good bit of what you're concerned about?

Ms. LIEBMAN. I certainly think it would be another weapon in the arsenal, and injunctive relief——

Senator SPECTER. In your arsenal?

Ms. LIEBMAN. In the arsenal, yes.

Senator SPECTER. Go a little further, aside from having a quiver full of arrows.

Let me recommend to you that injunctions are really good. I practice law and there's nothing like an injunction. It gets it done right away.

Let me turn to this issue of the posting of remedies. Senator Harkin broached it. Chairman Schaumber, why not require that the employers post in the workplace official notice of employers' rights under section 7 of the National Labor Relations Act?

My staffer notes this to be similar to the EEOC but it would also be similar to airports and hospitals. Notification of rights is pretty fundamental.

Any objection to posting employers' rights? Employees' rights or employers' rights? Everybody's rights?

Mr. SCHAUMBER. I know of none, Senator. With regard to the act, there is no notice posting requirement. That's the difficulty with respect to the act.

Senator SPECTER. No state posting—no notice posting?

Mr. SCHAUMBER. There's no provision in the act as to the——

Senator SPECTER. Does that come under the interdiction of not commenting about the proposed legislation?

Mr. SCHAUMBER. Pardon me?

Senator SPECTER. Does that come under the interdiction of not commenting on proposed legislation?

Mr. SCHAUMBER. I hope not.

Senator SPECTER. Or is it an interdiction? It's just something you have decided among yourselves?

Mr. SCHAUMBER. No, no, no. In fact, there's some disagreement, but I think the reason why the Board has not acted, although I quite candidly think the Board should have acted on it 10 years

ago, on the petition seeking notice posting is because a number of Board members believe the statute did not authorize us to do so.

What, for example, is——

Senator SPECTER. So, we can change the statute?

Mr. SCHAUMBER. You certainly can, Senator.

Senator SPECTER. I've been advised by my general counsel that I've covered everything and I always take my lawyer's advice.

Thank you, Senator Harkin. I do not need a second round.

Senator HARKIN. I just have a couple of other questions.

Mr. Schaumber, in fiscal year 2007, my staff informs me that 976 petitions for an election were filed where no election ever happened. That was 32 percent of all petitions. There was 33 percent in 2006, 46 percent in 2005. Again, I just question why are so many petitions not making it all the way to an election?

Mr. SCHAUMBER. Senator, I'm a bit at a loss. I'm unfamiliar with those numbers. We—the numbers of which—well, one of the reasons that an election doesn't go forward, it can be voluntarily withdrawn.

With regard to RC, that is petitions by which unions are seeking certification, in 2007, there were roughly 2,300 such petitions filed, 2,030 went forward. These are the numbers which I received from the general counsel's office, which would mean that roughly 300 did not, and very often petitions are withdrawn.

But I don't—I'd be happy to supplement the record if I had those figures and confirm them with the general counsel.

Senator HARKIN. Well, that's just figures I was given here. That's all I know. I'll get those to you and if you'd respond, I'd appreciate it.

Mr. SCHAUMBER. We will do so.

Senator HARKIN. Thank you very much on that data. The latest annual report includes 40 tables and 18 charts on labor violations, but no where does it say how many violations happened during elections. Every 6 months, the NLRB publishes 40 pages of statistics on recent elections but not a single number on a single page tells us about anything about violations or problems in those elections. We don't even know how many elections had an illegal firing or suspension.

I think this would be important for us to know. Both sides, industry and unions, will testify on the second panel that the information provided by the Board isn't helpful, can't be studied, at least that's from their written testimony, and I just wondered if you could respond to that.

Mr. SCHAUMBER. Yes, Senator. I certainly agree with you that that would be information well worth having.

We asked, in preparation for the hearing, that very question; that is, the number of ULPs that are committed during organizing campaigns. I received some data. In fact, it was in my oral statement. I withdrew it yesterday because it was inconsistent with some other data and I asked for an explanation from the general counsel's side of the agency. They are reviewing the figures now and I will be able to supplement my statement with it.

Senator HARKIN. Okay.

Mr. SCHAUMBER. I would just give you one figure which is that we know that unions file charges, blocking charges in 4.8 percent

of RC, that is certification, elections. So, now those charges may be meritorious, they may not be, but it gives you an idea of the, if you will, what may or may not be the scope of the problem.

Can I supplement that with one further thing?

Senator HARKIN. Sure.

Mr. SCHAUMBER. We are also speaking with the general counsel side and the general counsel is interested in trying to improve their data collection and we have a new computer system. One of the problems—and I'm sure you don't want to hear about this—is that apparently when they try to retrieve data, it comes in different years, it comes from different places, and they're having some difficulty with it, but that is a new initiative which I believe the general counsel is going to undertake.

Senator HARKIN. Thank you, Mr. Chairman. Ms. Liebman, do you have anything else to add to the hearing?

Ms. LIEBMAN. Just in response to the question you posed. In the mid 1990s, when I was the Deputy Director at the Federal Mediation and Conciliation Service, the Dunlop Commission inquiry was ongoing, and at that time, the Dunlop Commission was very concerned about some of these same issues and they got together with people at the NLRB and the FMCS to see if we could do some coordination of our data to answer some of the questions that you just posed.

It took some time for the computer systems, and I don't know the technicalities of what was done. But Tom Kochan, who was the professor at MIT that I mentioned, was on the Dunlop Commission, and he's kept after this initiative. It is his scholarly work that is still a work in progress, but that I cited in my testimony. They've tried to coordinate those NLRB certifications that are then sent to the Federal Mediation Service, which are then assigned as cases to the mediators to give special attention to as first contracts.

They tried to look at the incidence of unfair labor practices during the elections and during the negotiations and that data, I'm sure, would be, could be made available to you if you were interested.

Senator HARKIN. That data just isn't available to the public?

Ms. LIEBMAN. Well, I think the professors are still working on their conclusions, but I'm sure it could be submitted for the record. I didn't want to do it without their permission, but I could certainly try to get that for you, if you are interested. As I say, they consider it a work in progress.

Senator HARKIN. We'll get back to you on that.

Senator SPECTER. Mr. Chairman, I have just one more question for Ms. Liebman, and that is, the Board adjudicates many cases in which unfair labor practices were committed, where, for example, an employer discourages its employees from supporting a union's organizing campaign by firing an employee whose support is known and visible.

In 2005, for example, there were more than 2,000 such cases, and some of the criticism has been that that's just part of the cost of doing business.

Would you care to render an opinion on whether the remedies might be expanded to have double or treble back pay or a fine or attorneys fees to increase those penalties?

Ms. LIEBMAN. Yeah. Let me say, as I have said already, that the Board's remedies, particularly with respect to unlawful discharges but refusals to bargain as well, have been treated by many scholars and observers of the Board for years as notoriously weak. This really was the first workplace statute.

Since then, many discrimination statutes have been passed by the Federal Government and by States and most of those contain remedies which provide much more by way of compensation to the victim of discrimination, whether compensatory damages or other types of measures.

All the Board can do is provide back pay which has to be mitigated by the interim earnings and order reinstatement. I don't know what the numbers are. My understanding is that very few people actually take reinstatement and when they——

Senator SPECTER. Well, the mitigation provision substantially reduces any obligation.

Ms. LIEBMAN. Yes, it does, and recent decisions of the Board have really increased some of the burdens on an employee to mitigate. One recent decision said that if the employee didn't go out and look for a job immediately, then there was evidence of his idling and so the back pay would be reduced.

As I recall the facts in that case, the——

Senator SPECTER. So it's reduced not only by mitigation but some theory of lack of effort to——

Ms. LIEBMAN. Yes.

Senator SPECTER [continuing]. Find a job?

Ms. LIEBMAN. Yes, if it's found that they didn't make a sufficient effort to look for a job.

So, the remedies clearly are weak and certainly a revisiting of the remedies is warranted, not only in the discharge cases but also the bad faith bargaining cases. Essentially the remedy in a bad faith bargaining case is stop bargaining in bad faith, to bargain in good faith, and to post a notice. Those are kind of weak.

I think if an employer is intent on killing an organizing drive, the deterrent value from our remedies are really quite minimal.

Senator SPECTER. Thank you, Ms. Liebman. Thank you, Chairman Schaumber.

Mr. SCHAUMBER. Senator Specter, could I just add one thing for the record? I believe under Title VII, there's a mitigation requirement and I believe the case Member Liebman is referring to, we gave the employee 2 weeks' time before they began looking for a job.

Senator HARKIN. Thank you. Thank you very much, both of you. We'll call our second panel now. Thank you, both. You're dismissed.

Dr. Gordon Lafer, Director of Labor Education and Research Center, University of Oregon, author of a book called "Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections."

Dr. Lafer received his degree in Economics from Swarthmore College and his Ph.D. with distinction from Yale University in 1995.

John Raudabaugh is a partner at Baker & McKenzie in Chicago. He was a member of the NLRB from 1990 to 1993, and he holds a B.S. in Labor Economics from the University of Pennsylvania, a

Master's degree from Cornell, and his Juris Doctorate from the University of Virginia.

Welcome, both of you, to the hearing, and as I said before, your records will be made a part of the record in their entirety, and I'd ask you, please, to proceed and we start with Dr. Lafer, at least that's what my book says here.

STATEMENT OF GORDON LAFER, Ph.D., ASSOCIATE PROFESSOR, LABOR EDUCATION AND RESEARCH CENTER, UNIVERSITY OF OREGON, EUGENE, OREGON

Dr. LAFER. Chairman Harkin, Senator Specter, thank you for the opportunity to be here.

My name is Gordon Lafer. I hold a Ph.D. in Political Science from Yale University, and I'm now a professor at the University of Oregon. I'm also the founding co-chair of the American Political Science Association's Labor Project.

Over the last 4 years, I've done extensive research comparing NLRB elections to the American standards defined from the founding fathers to the present for determining what constitutes a free and fair election.

I think that when most people hear that there's something called "union elections," they assume that they must work the same way as elections to Congress or the presidency, and unfortunately nothing could be further from the truth.

On close inspection, what NLRB elections look like is more like the discredited practices of rogue regimes abroad than like anything we would call American. I've attached an extensive report that summarizes that research. I want to touch on just a few of those points today.

Senator HARKIN. Do we have that report?

Dr. LAFER. Please.

Senator HARKIN. Not right now.

Dr. LAFER. I understand. Let me start by just saying a word about secret ballots. There's some who suggest that as long as an election ends in a secret ballot, it doesn't matter what happens before, it's got to be fair, that in the workplace, even if an employee is intimidated into telling their employer that they're anti-union, as long as at the end of the day, they get to go into a private voting booth and vote their conscience in secret, the election is fair.

It's critical to note that the American democratic tradition for 250 years fundamentally rejects this view. While, of course, we have secret ballots in Federal elections, there are a host of other standards in the time leading up to election day, things like freedom of speech, equal access to the media, that must be in place for an election to be deemed free and fair.

Indeed, our government regularly condemns as undemocratic elections in other countries, even when there is no question that the election ended in a secret ballot. After all, Saddam Hussein had secret ballots. The Republic of Iran uses secret ballots. How dictatorial regimes remain in power with the use of secret ballots is by threatening the employment of people who disagree with the ruling party, dominating the media and shutting out the opposition, not letting the opposition have candidates to the voters. These are well known techniques. We call these sham elections.

Unfortunately, when measured against these standards, every single aspect of the NLRB system, with the partial exception of the secret ballot, and as I'll describe later, there is not really a secret ballot in NLRB elections, but every other aspect fails to meet the minimum standards that we use in American democracy for qualifying an election as free and fair.

Let me just touch on a few of these. The first is equal access to voter lists. The first thing that anyone does in the United States, if they're contemplating running for office, is usually go to the registrar of voters and say I'd like to have a list of eligible voters in my district.

By law, the registrar must supply that list on the same basis at the same time and the same cost to both candidates. In NLRB elections, however, management obviously has the complete contact information for all employees, from their date of hire, and is free to campaign against unionization from day one while pro-union employees only get the list of eligible voters after a petition has been filed and after all legal challenges have been exhausted.

When the Dunlop Commission, the last commission to study this, looked at this, they concluded that on average, pro-union employees got the list only 10 to 20 days before the vote.

If we think about elections to the Senate happening this way, where one candidate got the voter rolls 2 years before the vote and the other one got it 20 days before the election, none of us would call this free or fair and the fact that it ended in a secret ballot would in no way change that.

Free speech obviously is the cornerstone of American democracy, including equal access to the media. There's no such thing as a park or a mall which is available to one candidate in Federal elections and off-limits to the other. Radio and TV stations are required to sell ad time on an equal basis, et. cetera.

But in NLRB elections, management is allowed to plaster the workplace with anti-union posters, bullet boards and leaflets while banning pro-union employees from doing likewise. Anti-union managers are free to campaign all day every day every place in the workplace against unionization while pro-union employees can only talk about unionization on their break time.

The most extreme restriction on free speech is employers forcing workers to attend mass anti-union meetings. Not only is the union side not given equal time but pro-union employees can be forced to attend on condition that they not ask any questions and if they do open their mouth and ask a question anyway, they can be fired on the spot and that is legal.

Let me say a brief word about the issue of economic coercion of voters, which is an issue from the founding fathers that there's been great concern about. The founding fathers were very concerned that employees would be unduly influenced by their employers.

Alexander Hamilton worried that "generally power over a man's purse is power over his will," and for this reason, we have a raft of Federal and State statutes specifically designed to protect employees from the undue influence of their employers.

In Federal elections, for instance, under the FEC, it is blanket illegal for a private corporation to tell its rank and file employees

anything about which candidate or which party they think they should support. So, the very thing that is banned in Federal elections because Federal law understands that employees are very nervous and very sensitive to the words of their employers, that thing is not only legal but is the centerpiece of management anti-union campaigns under the NLRB which is having upper level management and immediate supervisors repeatedly stress to their people that are their subordinates why they should vote no.

I mentioned before that there is not truly a secret ballot in the NLRB system and I want to explain this. The principle of the secret ballot in America is not that you only have a secret ballot for the 30 seconds when you're in the voting booth. It is more broadly the principle that you have the right to keep your political opinions to yourself before, during and after the act of voting.

If a neighbor or someone running for office or a canvasser knocks on your door and says I'd like to know who you're supporting. You are free to say I'd rather not talk about it, it's none of your business.

In the employment situation, under the NLRB, management is schooled, and this is not my say-so, this is in the written manuals of the multimillion dollar industry of management side attorneys and consultants, tells supervisors to go to each of their subordinates and because it's illegal for them to say are you voting union or not, they're schooled in having whether eyeball-to-eyeball conversations, making provocative anti-union statements, listening to someone's reaction, watching their body language, and grading them on a 1-to-5 scale if they're pro-union or anti-union, and doing this repeatedly day after day after day.

If you're a supremely skilled actor or liar, you can keep your opinion hidden, but for the vast majority of people, their opinion is known long before they walk into the voting booth. To have privacy for the 30 seconds you're in the voting booth when your employer already knows before you walk in there which way you're going to vote is a sham secret ballot. It's an evisceration of the real principle of the secret ballot.

The sad fact is that right now, our government upholds higher standards for voters abroad than at home. For instance, in 2002, the State Department condemned elections in the Ukraine for being undemocratic. Among the reasons they cited were that employees of state-owned enterprises were pressured to support the ruling party, faculty and students were instructed by their university to vote for specific candidates, and the ruling party dominated the media while shutting out the opposition.

Every one of these practices for which the Ukrainian elections were deemed undemocratic are completely legal and completely commonplace in NLRB.

Let me just say finally that one of the final problems with the system is not just a profoundly undemocratic election system but a system that is set up to allow anti-union consultants to prevent there from ever being an election, and on this point, I think it's important to know that while employer associations, including the Chamber of Commerce in previous testimony, have stated their opposition to the Employee Free Choice Act by saying they're defending the employee's sacred right to a secret ballot election.

In their own publications of management side, attorneys and consultants, including many who are affiliated with the Chamber of Commerce and other employer associations, what they say is their foremost goal is to deny employees the right to any election whatsoever, secret ballot or otherwise.

To get an election under the NLRB, 30 percent of employees need to sign cards to file a petition. The union avoidance industry says its first and foremost goal is to run an anti-union campaign that stops employees from ever collecting 30 percent of their co-workers' signatures, so there never can be an election, and again this is not something that I'm making up.

The law firm of Jackson, Lewis, one of the most prominent management side labor law firms, and I'm sure Mr. Raudabaugh's familiar with this since one of their partners sits on his Labor and Employment Relations Committee at the Chamber of Commerce, says, "Winning an NLRB election undoubtedly is an achievement, a greater achievement is not having won at all."

So, I think it's important for us to know that the problem with the system is both that it's a profoundly undemocratic election system and that it's one that facilitates a multimillion dollar industry whose goal is for workers to never even get to an election.

PREPARED STATEMENT

I would like to say in conclusion simply that unfortunately, I think the problems with the system are not problems that can be fixed by tinkering or by better funding or by administrative fixes. They're problems that require fundamental changes in the law and if we're serious about providing democratic rights for workers in the American workplace, we need to look at those problems seriously and begin at that point.

Thank you very much. I'd be happy to answer any questions the committee may have.

Senator HARKIN. Thank you very much.

[The statement follows:]

PREPARED STATEMENT OF DR. GORDON LAFER

Chairman Harkin, Senator Specter, and members of the committee, thank you for the opportunity to participate in this hearing. My name is Gordon Lafer. I hold a PhD in Political Science from Yale University and am currently a professor at the University of Oregon's Labor Education and Research Center. I am also the founding co-chair of the American Political Science Association's Labor Project.

Over the past 4 years, I have conducted extensive research measuring the extent to which National Labor Relations Board elections match up to American standards—developed from the Founding Fathers to the present—for defining "free and fair" elections. Unfortunately, I must report that NLRB elections look more like the discredited practices of rogue regimes abroad than like anything we would call American.

I would like to briefly describe the problems that currently plague the NLRB election system as well as the difficulties in negotiating first contracts.

I have attached a report that summarizes my research on NLRB elections.

Today I want to focus on just a few highlights.

THE ROLE OF SECRET BALLOTS

In fact, there is no truly secret ballot in Labor Board elections, because supervisors are permitted to interrogate their underlings in terms that force most employees to reveal their political choices long before they step into the voting booth. The pressure tactics used to force employees to reveal their political preferences would be illegal in any election to the Senate—and we would not tolerate them in any for-

eign elections that claimed to be democratic. I would be happy to explain this problem further if Senators have followup questions on this issue.

Before going into the substance of my findings, I want to say a word about secret ballots, since so much of the debate around labor law reform has focused on the role of secret ballots.

Defenders of the current system argue that NLRB elections represent the "gold standard" for democracy in the workplace for a single reason: that Board elections end in a secret ballot.

To some, it may seem that as long as an election ends in a secret ballot, it must be fair. In the workplace, one might imagine that even in the worst case, if a worker is intimidated by his or her employer, one could lie to one's supervisor and pretend to be opposing the union; as long as, at the end of the day, you cast your ballot in the privacy of a voting booth, you are free to exercise your conscience.

It is critical to note that the American democratic tradition—from the Founders to the present—fundamentally rejects this view. In elections to public office, while the secret ballot is a necessary ingredient, there are a whole set of standards that must be met in the leadup to election day—such as equal access to the media and voters, free speech, etc.—which are equally crucial elements of defining a "free and fair" process. Indeed, our government has often condemned elections abroad when there was no question that they ended in a secret ballot, because they failed to meet these other, equally important standards.

After all, even Saddam Hussein had secret ballots. Indeed, history is full of dictatorial regimes that have remained in power despite the use of secret ballot elections. How do they do it? Through things such as threatening the livelihoods of opponents; denying them access to the media; and forcing all voters to attend propaganda rallies for the ruling party. Our government has rightly condemned these votes as "sham elections."

Unfortunately, the very standards that we insist on as minimal guarantors of democracy in other countries is violated by the NLRB system. With the exception of the secret ballot—and, as I will discuss later, there is no truly secret ballot in NLRB elections—every other aspect of NLRB elections fails to meet American standards defining "free and fair" elections.

Today I would like to focus on just three dimensions of democratic elections: access to voters; free speech; and protection of voters from economic coercion.

ACCESS TO VOTER LISTS

The first step in any American election campaign is getting a list of eligible voters, and it is law that both parties must have equal access to the voter rolls.

In NLRB elections, however, management has a complete list of employee contact information, and can use this for campaigning against unionization at any time—while employees have no equal right to such lists. Employers use legal maneuvers to delay union elections for months. Only after all delays have been settled does the union have a right to the list of eligible voters. A federal commission found that on average, unions received the voter list less than 20 days before the election.[1] Even then, the NLRB requires employers to provide workers' names and addresses—but no apartment numbers, zip codes, or telephone numbers.

If we imagine this system being applied to senatorial elections—where one candidate had the voter rolls 2 years before election day, while his or her opponent was restricted to a partial list and only got it a month before the vote—none of us would call this a "free and fair" election.

ECONOMIC COERCION OF VOTERS

When the founders of our country created the world's first democracy and gave the vote to the common people, they were particularly concerned that employers might use their economic power over workers to influence their political choices. In general, Alexander Hamilton warned, "power over a man's purse is power over his will."

For this reason, there is a wide range of Federal and State laws that make sure employees can make political choices free from economic coercion.

In Federal elections, it is illegal for a private corporation to tell its employees how they should vote, or to suggest that if one party wins business will suffer and workers will be laid off.[2] Supervisors or managers can't say anything to those they over-

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[1] Dunlop Commission, Final Report, p. 47.

[2] Under FECA, corporations are free to campaign to their "restricted class" of managerial and supervisory employees, but are prohibited from engaging in any communication to rank-and-file employees that includes express advocacy for a specific candidate or party. 2 USC 441(b)(2)(A);

see that amounts to endorsing one side or the other. It is noteworthy that Federal law doesn't require that employers spell out a quid pro quo threat stating, for instance, that anyone caught wearing a button supporting the "wrong" candidate will never get a promotion. It is understood that employees naturally are extremely sensitive to the need to make a good impression on their boss, and don't need a threat to be spelled out for it to influence their behavior. Thus, Federal law protects the ability of workers to make a political choice based on personal conscience rather than economic coercion.

But in NLRB elections, this kind of intimidation is completely legal. Standard employer behavior involves having mass meetings where upper management attacks the idea of unionization, and then having supervisors tell each of their subordinates personally that they should vote against the union. In this way, NLRB elections maximize exactly the kind of behavior that is banned in federal elections.

FREE SPEECH AND EQUAL ACCESS TO MEDIA

Free speech is the cornerstone of American democracy.

In election to public office, it is a bedrock principle that there is no such thing as a neighborhood, park or shopping mall that is accessible to one candidate but off-limits to the other. Radio and television stations are required to sell ad time on the same terms to competing candidates. Even private corporations are prohibited from inviting one candidate to address employees without giving equal opportunity to the opposition. From the founders to the present, it has been understood that democracy requires free speech, equal access to the media, and robust debate.

Yet this most basic standard of freedom is ignored by the NLRB.

Management is allowed to plaster the workplace with anti-union leaflets, posters, and banners—while maintaining a ban on pro-union employees doing likewise.

In addition, anti-union managers are free to campaign against unionization all day long, anyplace in the workplace, while pro-union workers are banned from talking about unionization except on break times. As a result, research shows that in a typical campaign, most employees never even have a single conversation with a union representative.

The most extreme restriction on free speech is employers' forcing workers to attend mass anti-union meetings. Not only is the union given no equal time, but pro-union employees can be forced to attend with the condition that they don't open their mouths. If they ask a question, they can be fired on the spot.

If, during the 2004 presidential election, the Bush campaign could have forced every voter in America to watch the *Swiftboat Veterans' for Truth* movie, with no opportunity for response from the other side—or if the Democrats could have forced everyone to watch *Fahrenheit 9/11*—they might well have seized the opportunity. But none of us would call this democracy.

NO TRULY SECRET BALLOT IN NLRB ELECTIONS

While defenders of the NLRB system point to its secret ballot as the guarantor of democratic rights, in fact the system does not guarantee true privacy of the ballot.

In the American democratic tradition, the principle of the secret ballot is more than simply the fact that one enters a private booth to cast one's ballot. It is, more broadly, the right to keep one's political opinions to oneself—before, during and after the moment of voting. If a friend, neighbor or canvasser asks whom you are supporting in an election, you don't have to say. Indeed, you don't have to talk to them at all. The right to a secret ballot includes the right to refuse to participate in conversations designed to flush out one's politics: you cannot be forced to engage in a conversation that reveals your political preferences. It is this right, as much as what happens on Election Day itself, that makes up the principle of the secret ballot. Each of us is guaranteed the right to make political decisions as a matter of individual conscience, and to control how and whether we choose to share that with anyone else.

While NLRB elections do culminate in a private voting booth, they effectively undermine the secret ballot by allowing management to engage in practices that force workers to reveal their political preferences long before they step into the voting booth.

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11 CRF 114.3, 114.4. According to the FEC, "express advocacy" can be either an explicit message to vote for or against a given candidate, or a message that doesn't use such explicit language but that "can only be interpreted by a 'reasonable person' as advocating the election or defeat of one or more clearly identified candidates." Federal Election Commission, Campaign Guide for Corporations and Labor Organizations, Washington, DC, June 2001, p. 31.

The standard procedure of employers—as documented in the guidebooks of management-side attorneys and consultants—is to have every supervisor require each of their subordinates to participate in intensive one-on-one conversations designed to flush out that worker's feelings about unionization. These conversations happen multiple times during the course of the election campaign—sometimes multiple times per week. Because it is illegal to directly ask workers how they're voting, supervisors are coached in how to get this information without using those explicit words. Supervisors are, instead, instructed to have "eyeball to eyeball" conversations, in which they make provocative anti-union statements, and then carefully observe their subordinates' body language, listen to their response, and report back to the consultants who typically run such campaigns, grading each worker on a 1–5 scale measuring their political leanings.

Employees cannot refuse to participate in these conversations. But under this type of interrogation, only the most skilled of actors or dissemblers can fool their supervisors and keep their political leanings truly secret. Everyone else reveals their preferences—indeed, one management attorney boasted that, through the use of such methods, he could almost always predict the final vote total with remarkable accuracy.

The principle of the secret ballot is that you have the right to keep your political opinions to yourself forever, not just for the 60 seconds that you stand in the voting booth. By permitting employers to limit the secrecy of the ballot to the moment of voting, the NLRB system has hollowed out the fundamental meaning of this principle.

These practices would of course all be illegal if carried out in the context of a campaign for federal office. If we saw this happening in another country, we'd say that the secret ballot had been eviscerated in all but name. But this is the system currently in place in workplaces across our country.

HIGHER STANDARDS ABROAD THAN AT HOME

The truth is that we uphold higher standards for voters abroad than for American workers.

In 2002, the State Department condemned elections in Ukraine for failing to "ensure a level playing field," because:

—employees of state-owned enterprises were pressured to support the ruling party;

—faculty and students were instructed by their university to vote for specific candidates; and

—the governing party enjoyed one-sided media coverage, while the opposition was largely shut out of state-run television.

Every one of these practices is completely legal under the NLRB.

The sad fact is that right now, our government demands higher standards of democracy for voters in Ukraine than it does for Americans in workplaces across the country.

NEGOTIATING A FIRST CONTRACT

As stated in the Wagner Act, it is Federal policy to encourage collective bargaining. One of the major obstacles to realizing this goal, however, is the difficulty workers face, even after winning recognition of their union, in negotiating a first contract. Studies estimate the up to one-third of newly organized unions fail to ever achieve a first contract.

This remarkable failure rate represents a widespread effort of employers to eliminate collective bargaining before it can take root as established practice in the firm. These employers view first contract negotiations as a second chance—following an election in which workers choose to organize—to keep their employees from having a collective voice in the workplace.

The NLRB system, while not per se encouraging such obstructionist behavior, greatly facilitates it. Employer-side attorneys and consultants regularly counsel their clients to adopt a strategy of maximum delay, in order to erode employees' sense of hope and confidence in the collective bargaining process; there is nothing in the NLRB system to contain such tactics. Furthermore, when employers violate the law by refusing to bargain in good faith, by far the most common remedy required by the Board is simply for employers to promise to act correctly in the future; no penalty of any kind is imposed. Finally, when negotiations reach an impasse and both sides declare themselves stuck, the NLRB system imposes a one-sided solution: management's last proposal is unilaterally implemented and, by force of law, becomes the contract under which employees are governed. The ease with which most employees can be replaced, and the legal right of employers to permanently replace

strikers, means that most workers cannot afford to strike to prevent this one-sided resolution. Knowing this, management-side attorneys often adopt a negotiating strategy explicitly aimed at reaching the point of impasse, forcing employees into a choice between an undesirable contract and the prospect of a long, costly and difficult strike.

Those who defend the current system against the proposal for first-contract arbitration sometimes insist that they are motivated by defending the right of employees to vote for themselves on what defines acceptable contract terms. But forcing employees to choose between a losing strike and having a one-sided contract unilaterally imposed on them is not a defense of workers' rights. I would guess that most employees would be perfectly happy to forego the "right" to have a contract unilaterally imposed on them.

Similarly, opponents of first-contract arbitration sometimes raise the prospect of arbitrators deciding contracts on terms that render an employer financially insolvent or uncompetitive. But the data do not support this fear. There is an extensive track record of labor contracts settled by arbitration—in the private sector, in the public sector, and in other countries. I do not know of a single case where a public or private entity was forced to close operations as a result of contract terms established by arbitration.

For employees—and for the federal goal of encouraging a stable regime of collective bargaining—establishing an impartial and non-confrontational means for settling first contracts would be a major step forward.

ILLEGAL ACTIVITY IN NLRB SYSTEM, COMPARED WITH FEC

The things I've described so far are legal. However, NLRB elections are also characterized by an extraordinary level of illegal activity.

Labor law is the only area of American employment law in which it is statutorily impossible to impose fines, prison, or any other punitive damage.

As a result, it is not just "rogue" employers who break the law. Any rational employer might decide it's worth it to fire a few workers in order to scare hundreds more into abandoning their support for unionization.

In my research, I have measured the impact of illegal retaliation against union supporters by making the most conservative possible calculations. Nevertheless, the results are extremely troubling. One out of every 17 eligible voters in NLRB elections is fired, suspended, demoted or otherwise economically punished for supporting unionization.

If Federal elections were run by NLRB standards, we would have seen 7.5 million Americans economically penalized for backing the "wrong" candidate in the last presidential election cycle.

Imagine what this would mean. Every family in America would know someone who had been fired or suspended in retaliation for their political beliefs. Most citizens would quickly become too scared to participate in any public show of support for non-incumbent candidates. If we continued to hold elections amidst such widespread repression, they would be sham elections. The outcome would not represent the popular will, but would simply reflect the fear that governed the country.

What I'm describing may sound like a bad science fiction movie. But it is the reality that workers face when they try to organize.

If we compare illegal activity per voter under the NLRB with that under the FEC, the data suggests that NLRB elections are 3,500 times dirtier than federal elections.

This number may sound incredible; but it's true. But suppose my numbers are off by as much as an entire order of magnitude. Then the NLRB system would be only 350 times dirtier than Federal elections.

Any way you count it, the system is profoundly broken, profoundly undemocratic, and, I would say, profoundly un-American.

CONCLUSION

If we're serious about having a truly democratic process for American workers, we must begin by fixing these problems.

The undemocratic nature of the NLRB election system cannot be fixed by better funding or smarter administration. In can only be fixed by changing the law.

Thank you again for the opportunity to be here today.

I would be happy to answer any questions you may have.

Attachment

G. Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections,* American Rights at Work, Washington, DC, July 2007.

[CLERK'S NOTE.—This material can be found at info@americanrightsatwork.org or www.americanrightsatwork.org

Senator HARKIN. Mr. Raudabaugh.

STATEMENT OF JOHN N. RAUDABAUGH, ESQ., PARTNER, BAKER & McKENZIE, LLP, CHICAGO, ILLINOIS

Mr. RAUDABAUGH. Chairman Harkin and members of the subcommittee, thank you for inviting me to testify regarding NLRB Representation Elections and Initial Collective Bargaining Agreements, Safeguarding Workers' Rights, and just as a personal aside, I'm particularly pleased to be here with Senators from both Iowa and Pennsylvania, having my family come from Iowa and attended college at the University of Pennsylvania.

This hearing examines Board elections and certified representatives' ability to obtain first contract by explicitly questioning whether workers' rights are protected in the process.

Of course, workers' rights and the issues of elections and first contracts would be resolved quite differently were the Employee Free Choice Act to become law. Organized labor is fighting for its institutional life to be the only form of worker voice and to recapture a density from a time not to return as acknowledged by many, many professors and academics cited in my paper.

Are workers' rights safeguarded in the NLRB election process? Yes. In fiscal year 2007, 1,559 elections were conducted and unions won 54.3 percent of those elections, the same rate they had for the years 1970 to 1974. Elections were conducted in a median of 39 days and only 13 or 1.1 percent of the elections unions won were challenged by technical refusals to bargain.

Private sector union density has steadily declined from a high of 34 percent in 1954. This is not something new. In 2007, organized labor represented 7.5 percent of the private sector workforce. The reported prospects for a return to higher union densities are dim, reflecting a variety of factors, most notably the changed structure of the economy, employment shifting away from sectors where unions were historically strongest.

Historically, American unions have grown during periods of extraordinary periods of upheaval, economic depression or war. Without the upheaval and spurts in growth, private sector union density will only increase by bringing the union and non-union growth rates into rough equality. Given the union cost premiums of which they're proud and the resulting well transfers, this is unlikely in a highly-competitive global marketplace.

Despite these many factors and impediments to increasing union density, can union elections' success be improved on the margin by changes to the Board's election processes, by enhanced safeguards for workers' rights? I think perhaps.

What the academic forays into the issue of Board election procedures teach is that the publicly-reported Board representation case data should be made more robust which in turn may silence the current attacks or perhaps launch new ones. Publicly available representation case data should report time through each procedural stage to allow computation of mean, median, mode and range.

Case numbering should be expanded to facilitate correlation between C and R matters, unfair labor practice and representation

case matters, of like union and employer complements. Internal Board workings can be studied. Election cases exceeding the 39-day present median can be examined and lessons learned can be shared to the extent this isn't already done.

As to regional office and Board processing delays, consider, please, making fully transparent on the Board's website the daily status of all pending cases, including Board member actions and inactions. In my day, we had a one-member only list. If the three of you were on a panel and two of you had completed your decision, let's make it public. Who's holding up the time? To my knowledge, it's been 50 years since the Board's last investment in an outside comprehensive consultant study. This, too, may yield marginal improvements, but let's be clear.

To suggest that the Board's secret ballot process and the applicable case law regarding campaign conduct is "neither fair nor free or is a subversion of democracy" is wrongly using war-like metaphors and it's false.

Given the decline in union density, it follows that Board case law also declines, and I might add here that the ideas of extended terms or having Board members stay on until they're replaced are very appropriate suggestions.

Are workers' rights safeguarded while the institutional parties, both union and employer, meet at reasonable times and negotiate an initial agreement in good faith? Yes, despite claims by researchers that only 56 percent of union election victories result in a first contract or only 20 percent of organizing drives end up with a labor agreement.

The question of whether employee rights are protected relative to initial collective agreements implicitly suggests that failing at obtaining first contracts violates employee rights, but the act does not guarantee or mandate contract outcomes.

Determining initial contract outcomes is suspect, given the lack of available and relevant data. I recommend that the Board engage a consulting firm or a government research agency, and I'll volunteer my time as well, to initiate a study mindful of all the parameters necessary to answer the kinds of questions that Senator Harkin asked: types of petitions and charges, timing through each decisional stage, relatedness between and among petitions and charges.

Survey methodology and data must be public and available for independent research and assessment. Much, if not all, of the current academic research does studies limited to Chicago in a year, Indiana in 2 years. Believe me, from two degrees in labor economics and statistics, it is time to get all the data, analyze it and then we'll all live by the results, but going on these kinds of studies and making these incredible resolutions and suggestions is unfair to everyone.

Additional remedies of the kind contemplated in EFCA would require amending section 10(c) of the statute. The Board is not empowered to award punitive damages. Furthermore, any such expansion of remedial authority would raise due process concerns given the current absence of prehearing discovery and power to subpoena, and rectifying the due process issues will inevitably lead to

further delays in dispute resolution, election scheduling, and first contracts.

The recent trend for States to intrude into the area of labor law is also concerning, raising the specter of conflicting and flexibilities and costs imposed on employers and market competitiveness. To do anything to force first contracts contravenes the act and destroys our tradition of freedom of contract.

Whether by globalization, structural economic change, increased employer resistance given decreased union density, and corresponding economic leverage, unions' own complacency, as noted, or traditional adversarial unionism, 92.5 percent of the private sector workforce is not part of our legislated structured.

Is the choice to be all or nothing, full-fledged representation in a deliberately adversarial top-down paradigm or no collective representation? The act's section 8(a)(2) prohibition on "any organization of any kind which deals with employers denies millions of our fellow citizens a constructive voice at work."

Certainly the 92.5 percent of the private workforce who are not unionized are not well served by our current system offering the choice of confrontationalism or nothing but rare random opportunities for worker voice and participation.

The Dunlop Commission's first goal for the 21st century workforce was to expand coverage of employee participation and labor-management partnerships to more workers, more workplaces, and to more issues and decisions. Labor policy and the act should be modernized to offer workers, citizens, what they want and what the economy needs.

The Teamwork for Employees and Managers Act would have made this positive adjustment. Although the bill passed both Houses of Congress, it was unfortunately vetoed by President Clinton.

One final thought. If Board delay, political swings or perceived politics of Board appointees is as troubling and rife as the academics seem to make fond of, consider a new approach. Spare us the endless rhetoric and the appalling use of war-time metaphors and create an Article 3 court for labor and all workplace-related law enforcement.

PREPARED STATEMENT

This concludes my testimony, and I thank you very, very much for directing your attention to the issues of our modern day workplace. I look forward to discussing my comments during the question and answer period.

[The statement follows:]

PREPARED STATEMENT OF JOHN N. RAUDABAUGH

Chairman Harkin and members of the subcommittee, thank you for inviting me to testify regarding "NLRB Representation Elections and Initial Collective Bargaining Agreements: Safeguarding Workers' Rights?" I commend you and the committee for examining the "State of the Workplace."

By way of introduction, I was appointed by President George H.W. Bush, confirmed by the Senate and served as a Member of the National Labor Relations Board ("NLRB" or "Board") from August 27, 1990 until November 26, 1993. Prior to my NLRB service, I practiced labor law representing management. Before entering law school, I served four years as a U.S. Navy Supply Corps Officer and earned a Masters Degree in labor economics. Since leaving the NLRB, I returned to private

practice. I am a Partner and Chair of the U.S. Labor and Employee Relations Law Practice in the global law firm of Baker & McKenzie LLP. I teach labor law as an adjunct faculty member at Northwestern University School of Law. I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce and of the Labor Relations Special Expertise Panel of the Society for Human Resource Management. Today I am testifying in my personal capacity.

This Hearing examines NLRB elections and a certified representative's ability to obtain a first contract by explicitly questioning whether workers' rights are protected in the process. The form of the question reflects claims from organized labor and their supporters—"Workers' Rights Under Attack," "Middle Class at Risk," "A Human Rights Crisis," and a "September Massacre."[1] AOf course, workers' rights and the issues of elections and first contracts would be resolved/guaranteed differently were the proposed Employee Free Choice Act ("EFCA") to become law.[2]

Given the rhetoric and voluminous labor-generated press, it would be understandable to add a "by-line" to today's inquiry—"Lost in the Fog . . . Deliberately?" Organized labor, as we know it, is fighting for its institutional life, to be the only form of worker voice in an adversarial relationship, and to recapture a density from a time not to return.[3]

NLRB ELECTIONS AND EMPLOYEE RIGHTS

Are workers' rights safeguarded in the NLRB election process? Yes. In fiscal year 2007, 2,439 RC and RM petitions were filed, 1,559 elections were conducted, and unions won 54.3 percent of those elections, the same win rate as in 1970–1974. Elections were conducted in a median of 39 days. Only 13—or 1.1 percent—of the elections unions won were challenged by technical refusals to bargain.[4]

The notable Goldberg, Getman and Brett study, "Union Representation Elections: Law and Reality," studied 31 elections interviewed 1,000 employees and concluded that unlawful campaign tactics had no greater impact on employee voting behavior than lawful campaigning.[5] However, Weiler's commentaries take issue with the limited sample size of the Guldberg, Getman and Brett study and argue that Board processes and remedies are ineffective.[6] Weiler's ultimate complaint regarding ineffective remedies attacks *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), upholding the National Labor Relations Act's ("Act") fundamental policy of the freedom of contract precluding the Board from compelling agreement to contract terms. 29 U.S.C. §158(d). Nevertheless, accepting the freedom of contract rule, Weiler argues for quickie elections and certification, increased use of §10(j) remedies, and including §8(a)(3) charges within the scope of §10(l) relief.[7]

Andy Stern, International President of the Service Employees International Union, when asked about the Teamwork for Employees and Managers Act (an alternative to traditional labor organizations vetoed by the President Clinton) said: "Employees' representatives should be elected. . . . If the employers want representatives of the workplace, let them be elected. That's the American way."[8] So much for card-based, pressure prone alternatives to a secret ballot.[9]

Driving the quest for an "over the shoulder/in-your-face" card-based alternative to the secret ballot is organized labor's longstanding, institutional angst—declining union density, a labor economist's measure of success or failure in organized labor's ability to gain representational rights. Private sector union density has steadily de-

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[1] Congressman George Miller, July 13, 2006; AFL–C10 Press Releases June 9, 2005, October 24, 2005, October 23, 2006, October 25, 2007, March 27, 2008.

[2] S. 1041/H.R. 800, 110th Congress, 1st Session.

[3] Andy Stern, "Labor's New Deal," The Nation, April 7, 2008.

[4] NLRB Memorandum GC 08–01, December 5, 2007; Testimony of NLRB Chairman Robert Battista, Senate and House Committees, December 13, 2007, p.5; see also, Testimony of former Member Charles Cohen, House Committee, February 8, 2007, pp. 10–13; Testimony of former Chairman Peter Hurtgen, Senate Committee, March 27, 2007, p.8; Fact Finding Report, Commission on the Future of Worker-Management Relations, May 1994, p.81; Note, since the mid-1970s, the union win rate has been steady at or slightly above 50 percent, see Henry S. Farber and Bruce Western, "Accounting for the Decline of Unions in the Private Sector, 1973–1998," 22 Journal of Labor Research No. 3, Summer 2001, p. 467.

[5] Russell Sage Fnd., 1976.

[6] Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," 96 Harvard L. Rev. No. 8 (June 1983), pp. 1769–1827.

[7] Id.

[8] Interview, PBS Online Newshour, May 14, 1996.

[9] Minority Views, House Report 110–23, 110th Congress, 1st Session, "Employee Free Choice Act of 2007," pp. 51–59; Note, where card-checks experience coercion, there is a lesser likelihood of coercion with secret ballot votes, see Chris Riddell, "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978–1998, 57 ILR Review No. 4 (July 2004), p. 498.

clined from a high of 34 percent in 1954.[10] In 2007, organized labor represented 7.5 percent of the private sector workforce, up from 7.4 percent in 2006.[11]

The reported prospects for a return to higher union densities are dim, reflecting a variety of factors, most notably the changed structure of the economy—employment shifting away from sectors where unions were historically strongest.[12] And, the more competitive an industry, the less likely it can sustain a sizeable union premium.[13] Historically, American unions have grown during periods of extraordinary periods of upheaval—economic depression and war. Without the upheaval and spurts in growth, private sector density will only increase by bringing the union and nonunion growth rates into rough equality.[14] For owners of capital to be indifferent between investing in the union and nonunion sectors, given the union cost premiums and resulting wealth transfers, such is unlikely.[15]

Despite these many factors and impediments to increasing union density, can union election success be improved on the margin by changes to the Board's election processes by enhanced safeguards for workers' rights? Perhaps. Internal Board workings can be studied, election cases exceeding the present 39 day median can be examined, and "lessons learned" can be shared to the extent this is not already done. As to Regional Office and Board processing delays, consider making fully transparent on the Board's website the daily status of all C and R case matters including Board Member actions and inactions (One Member Only reports). And, to my knowledge, it has been 50 years since the Board's last investment in an outside comprehensive, consultant's study.[16] This too may yield marginal improvements. But let's be clear—to suggest that the Board's secret ballot process and the applicable caselaw regarding campaign conduct is "Neither Free Nor Fair" and is a "Subversion of Democracy" is as disgusting as it is false.[17]

The current, calculated attack on the Board's election process was sponsored, in part, by a study funded by the U.S. Trade Deficit Review Commission updating prior research on the impact of capital mobility, plant closings and threats of plant closings on private sector union organizing campaigns.[18] Based on interviews of union organizers from a sample of 407 Board certification elections during 1998–1999, in units of 50 or more eligible voters, plant closings and alleged threats of closings resulted in lower union election win rates.[19] The unions involved filed fewer charges with the Board because: (a) they thought the case was not strong enough to win; (b) they wanted to avoid the delay where they thought they would win the election outright; (c) they thought their witnesses would not come forward; or (d) they viewed the remedy as insufficient.[20] For these reasons, and based on comments of union organizers, card check recognition rather than Board elections and first contract arbitration rather than collective bargaining were recommended.[21]

Interestingly, in an earlier study of 261 elections during 1986 and 1987, the same researcher interviewed the corresponding union organizers but concluded only that the particular union tactics of representative leadership, personal contact, dignity and justice and an active presence used played an important role in determining election outcomes.[22] Rather than call for labor law reform, the study concludes—

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[10] NBER Working Paper 6012, Richard B. Freeman, "Spurts in Union Growth: Defining Moments and Social Processes," pp. 56–62.

[11] USDL 08–0092, "Union Members in 2007," Table 3.

[12] Farber and Western, supra, p. 459; Barry T. Hirsch and Edward J. Schumacher, "Private Sector Union Density and the Wage Premium: Past, Present and Future," 22 Journal of Labor Research, No. 3, (Summer 2001), p. 495.

[13] Hirsch and Schumacher, supra, pp. 495, 498, 510; Richard Vedder and Lowell Gallaway, "the Economic Effects of Labor Unions Revisited," 23 Journal of Labor Research No. 1, (Winter 2002), p. 128; Michael L. Wachter, "Judging Unions' Future Using a Historical Perspective: The Public Policy Choice Between Competition and Unionization," Institute for Law and Economics, Research Paper No. 03–09; Barry T. Hirsch, "Reconsidering Union Wage Effects: Surveying New Evidence on an Old Topic," Discussion Paper No. 795 (June 2003), p. 33.

[14] Farber and Western, supra, p. 482; see also, Richard B. Freeman, supra, p. 28.

[15] Id.

[16] House Report, 87th Congress, 1st Session, "Administration of the Labor-Management Relations Act by the NLRB," (Pucinski Report 1961), p. 72 referencing the McKinsey & Co., Inc. report.

[17] American Rights at Work Report, "Neither Free Nor Fair—The Subversion of Democracy Under National Labor Relations Board Elections," Gordon Lafer, 2007.

[18] Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing."

[19] Id. at 27.

[20] Id. at 32.

[21] Id. at 58.

[22] Kate Bronfenbrenner, "The Role of Union Strategies in NLRB Certification Elections," 50 ILR Review No. 2 (January 1997), pp. 198–211.

"union organizing strategy and tactics matters a great deal in determining certification election outcomes."[23]

Another "studied" attack on the Board's undermining of employee rights to organize evaluated 62 Chicago area elections in 2002 and interviews with 25 lead organizers and 11 anonymous employees.[24] The findings report that 30 percent of the employers allegedly fired workers for engaging in union activities, 49 percent threatened to close or relocate, and 82 percent used consultants. Reportedly, unions were hesitant to file charges where evidence may be insufficient, the election date may be delayed, and make-whole remedies and/or 10(j) relief may be lacking.[25]

Importantly, the "research methodology" for these "studies" is now exposed.[26] From a review of 11, 342 RC election cases filed between 2003 and 2005, 3,546 had a companion CA employer unfair labor practice filed. Of the CA charges, 2,008 were dismissed or withdrawn and of the reminder, 303—or 2.7 percent of the RC cases filed—resulted in an offer of reinstatement.[27] Of equal significance, the now famous 1983 Weiler "finding" that one in 20 pro-union employees was fired during union organizing campaigns, and the 2007 Schmitt and Zipperer "finding" of one in 76 were debunked by the 2008 Wilson research finding that less than one in 340 pro-union workers is fired during an organizational campaign.[28]

What is interesting is that the purpose for the "research," now discredited, attacking the Board's election process and calling for card-check, in lieu of secret ballot elections and interest arbitration for first contracts, rather than collective bargaining, is but "old wine in a new bottle." The same demands, without the academy's overlay, were made straightforwardly in the 1961 Congressional Hearings—and rejected.[29]

What the academic forays into the issue of Board election procedures teach is that publicly reported Board representation case data should be made more robust which, in turn, may silence the current attacks or perhaps, launch new ones. Publicly available representation case data should report time through each procedural stage to allow computation of mean, median, mode and range. Case numbering should be expanded to facilitate correlation between C and R matters of like union and employer components. And, Kochan's five basic questions should be reviewed by any researcher prior to initiating any study: (1) Is the research question framed in a way to yield useful policy information?; (2) Is the research design adequate to answer the questions of interest?; (3) Are the data analyses appropriate for the research design?; (4) Are conclusions consistent with the result and can the policy recommendations be derived from their conclusions?; and (5) How much weight should the results and recommendations be given in shaping law and agency policy?[30]

Having addressed and rejected the proffered evidence to attack the Board's election process, what is left are the polemics raised by EFCA regarding employee free choice. Choice requires information to process to decision.

The decision whether or not to support a union depends fundamentally on three questions: Are the conditions within the plant unsatisfactory? To what extent can the union improve on these conditions? Will representative by the union bring countervailing disadvantages as a result of due payments, strikes, or bitterness within the plant?[31]

Free choice requires the absence of pressure or coercion.[32] Card check provides neither. Unions want to be the sole provider of information, if any, and, stand next to employee to extract the signed card. It is EFCA that fails to safeguard employee rights.[33]

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[23] Id. at 211.

[24] Chirag Mehta and Nik Theodore, "Undermining The Right to Organize: Employer Behavior During Union Representation Campaigns," A Report for American Rights at Work, an Affiliate Group of the AFL–C10, 2005.

[25] Id. at 17.

[26] J. Justin Wilson, "Union Math, Union Myths," 2008.

[27] Id. at 6–7.

[28] Id; Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," 96 Harvard L. Rev. No. 8 (June 1983), pp. 1769–1827; John Schmitt and Ben Zipperer, "Dropping the Ax: Illegal Firings During Union Election Campaigns," Center for Economic and Policy Research, 2007.

[29] Pucinski Report, supra, p. 76.

[30] Thomas A. Kochan, "Legal Nonsense, Empirical Examination and Policy Evaluation," 29 Stanford, L. Rev. 1115 (1976).

[31] Derek C. Bok, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act," 78 Harvard L. Rev. p. 49 (1964).

[32] Id. at 46.

[33] Minority Views, House Report 110–23, 110th Congress, 1st, supra, pp. 51–59.

INITIAL COLLECTIVE BARGAINING AGREEMENTS AND EMPLOYEE RIGHTS

Are workers' rights safeguarded while the institutional parties—union and employer—meet at reasonable times and negotiate an initial agreement in good faith? Yes, despite claims by researchers that only 56 percent of union election victories result in a first contract or only 20 percent of organizing drives end up with a labor agreement.[34]

Cooke's study of 118 Indiana cases where unions won Board elections in 1979 and 1980 found a greater likelihood to obtaining first contracts when firms pay wages well above the industry average, when skilled national union representatives participate in negotiations, when bargaining units are larger, and when election victories are won with larger margins.[35] Detracting from achieving first contracts are NLRB delays in resolving post-election objections and challenges, post-election employer discrimination, and employer refusals to bargain.[36] Notably, strikes played a role in 23 percent of negotiations ultimately resulting in agreement and in 26 percent of failed negotiations.[37]

Perhaps the most debated discussion of first contract negotiations is Weiler's study testing his hypothesis on the negative effect of deficiencies in the law.[38] In a study of 271 election certifications in units of 100 employees or more between 1979 and 1981, Weiler found 172—or 63 percent—achieved a first contract. Weiler rejects interest arbitration as a remedy for bargaining impasse because it collides with the principle of free collective bargaining, but he would consider it as a special remedy for failure to bargain.[39] Weiler acknowledges the Supreme Court's emphasis on the fundamental policy of freedom of contract and the Act's admonition that agreement to a proposal or the making of a concession is not required.[40]

In response to Weiler, LaLonde and Meltzer argue that estimates of employers' refusals to bargain first contracts are too high and reject the "rogue employer" esis.[41] Their research of random samples of Board decisions from 1955 and 1980 disputes the NLRB General Counsel's 1978 claim that 90 percent of §8(a)(3) charges arise out of organizing campaigns and that 1 in 20 union supporters are discharged during a campaign.[42] Rather, many such discharges occurred in established bargaining relationships.[43] Notably, LaLonde and Meltzer argue that Board statistics fail to identify the labor relations contexts out of which actual and alleged violations arise to assess refusals to bargain first contracts.[44] Moreover, their research concluded that only two of the then existing five studies estimating first contract success were comparable finding a success rate range of 72–77.65 percent.[45]

The question of whether employee rights are protected relative to initial collective agreements implicitly suggests that failure at obtaining first contracts violates employee rights. But the Act does not guarantee or mandate contract outcomes.

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.[46]

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[34] John Paul Ferguson, "The Eyes of the Needle: Surviving Union Recognition Campaigns," MIT Institute for Work and Employment Research Working Paper, April 2006; "Modernizing Labor Law," The Boston Globe, June 21, 2007; Fact Finding Report, supra, p. 73; Micah Berul, "To Bargain or Not to Bargain Should Not Be the Question. Deterring Section 8(a)(5) Violations in First-Time Bargaining Situations through a Liberalized Standard for the Award of Litigation and Negotiation Costs," 18 The Labor Lawyer No. 1 (Summer 2002), p. 28.

[35] William N. Cooke, "The Failure to Negotiate First Contacts: Determinants and Policy Implications," 38 ILR Review No. 2 (January 1985), p. 176.

[36] Id.

[37] Id.

[38] Paul Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 Harvard L. Rev. No. 2 (December 1984), pp. 377, 404, 408–410. For a stark contrast, see Richard A. Epstein, "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation," 92 Yale L.J. No. 8 (July 1983) pp. 1357–1408; Julius G. Getman and Thomas C. Kohler, "The Common Law, Labor Law, and Reality: A Response to Professor Epstein," 92 Yale L.J. 1415–1434 (1983).

[39] Id.

[40] Id. at 360; 29 U.S.C. §158(d).

[41] Robert L. LaLonde and Bernard D. Meltzer, "Hard Times for Unions: Another Look at the Significance of Employer Illegalities," 58 U. Chicago L. Rev No. 3 (Summer 1991), pp 956, 965.

[42] Id. at 986.

[43] Id.

[44] Id. at 1007.

[45] Id. at 1013.

[46] Archibald Cox, "The Duty to Bargain in Good Faith," 71 Harvard L. Rev. No. 8 (June 1958), p. 1402.

Determining initial contract outcomes is suspect given the lack of available and relevant data. I recommend that the Board engage a consulting firm or a government research agency and initiate a study mindful of all parameters—types of petitions and charges, timing through each decisional stage and relatedness between and among petitions and charges.[47] Survey methodology and data must be public and available for independent research and assessment.

Apparent from all Board-related studies is that data selection, data availability and methodologies used to analyze Board case data universally result in limited and questionable findings and conclusions. Future research must give special attention to the impact of the NLRB General Counsel's First Contract Bargaining Initiative and the use of §10(j) injunctive relief and related special remedies in future Board orders.[48]

Additional remedies of the kind contemplated in EFCA would require amending §10(c) of the Act. 29 U.S.C. §160(c). The Board is not empowered to award punitive damages.[49] Furthermore, any such expansion of remedial authority would raise due process concerns given the current absence of pre-hearing discovery and power to subpoena. And, rectifying the due process issues will inevitably lead to further delays in dispute resolution, election scheduling, and/or first contracts. The recent trend for states to intrude into the arena of labor law is also problematic raising the specter of conflicting rigidities, inflexibilities and costs imposed on employers and market competitiveness.[50]

To do anything to force first contracts, including interest arbitration, contravenes the Act and destroys freedom of contract. It's hard to imagine such a revolutionary outcome in civil law. Even Weiler, a pro-Canadian labour law admirer, acknowledges that "if the cause of union decline is rejection by American workers of the institution, there is nothing that the law can or should do about that verdict."[51] "The decline of unions is largely due to economic pressures that the law can hardly control or withstand."[52] The explanation for union decline "lies primarily in natural market forces: structural changes in the American economy, increased domestic and foreign competition; and, yes, even increased employee opposition to private unionization."[53]

SAFEGUARDING ALL WORKERS' RIGHTS

According to one critic, "labor laws . . . have become nearly irrelevant, to the vast majority of private sector American workers."[54] Whether by globalization, structural economic change, increased employer resistance given decreased union density and corresponding economic leverage, unions' own complacency, or traditional adversarial unionism, 92.5 percent of the private sector workforce is not part of the legislated structure for industrial peace.[55]

Unions cannot survive if their employer "hosts" fail, yet employers can thrive without unions.[56] Given this economic reality for standoff, must American workers be left with—"It is what it is?" Is the choice to be all-or-nothing—full-fledged rep-

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[47] Id. at 1010.

[48] NLRB Memorandums GC 06–05, 06–07, 07–01 and 07–08.

[49] "To Bargain or Not to Bargain Should Not Be the Question. Deterring Section 8(a)(5) Violations in First-Time Bargaining Situations through a Liberalized Standard for the Award of Litigation and Negotiation Costs," supra at p.38; *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 235–236 (1938); *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 194 (1941); *Local 60, Carpenter's* v. *NLRB,* 365 U.S. 651, 655 (1961).

[50] Paul M. Secunda, "Towards the Viability of State—Based Legislation to Address Workplace Captive Audience Meetings in the United States," 29 Comparative Labor Law & Policy J. No. 1 (2007); see also *Chamber of Commerce of the U.S.* v. *Brown,* 463 F. 3rd 1076 (9th Cir. 2006), U.S.S.C. No. 06–939; Samuel Estreicher, "The Dunlop Report and the Future of Labor Law Reform," CATO Review No. 1 (1995); Samuel Estreicher, "Labor Law Reform in a World of Competitive Product Markets," 69 Chicago-Kent L. Rev. 3–46 (1993).

[51] "Hard Times for Unions: Challenging Times for Scholars," supra, p. 1018; In contrast, see Kenneth G. Dau-Schmidt, "A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace," 91 Michigan L. Rev. No. 3 (December 1992) pp. 419–514.

[52] Keith N. Hylton, "Law and the Future of Organized Labor in America," Boston University School of Law, Working Paper No. 03–14 (2003).

[53] Leo Troy, "Market Forces and Union Decline: A Response to Paul Weiler," 59 Univ. of Chicago L. Rev. No. 2 (Spring 1992) at p. 682.

[54] Cynthia L. Estlund, "Ossification of American Labor Law," 102 Columbia L. Rev. 1527 (2002) at p. 1528.

[55] Id.

[56] Id.

resentation in an adversarial top-down paradigm or no collective representation?[57] The Act's §8(a)(2) prohibition on "any organization of any kind" which "deals with" employers denies millions of fellow citizens a constructive voice at work.[58]

Traditional union governance regularizes and codifies worker tasks within a top-down command structure. In contrast, modern workplaces typically require interaction and two-way communications between workers and supervisors, accompanied by the use of bottom-up worker and managerial discretion that takes advantage of site-specific information. In contemporary workplaces, job hierarchies are often not clear-cut and worker decision-making is essential at most levels.[59]

Traditional unionism under the act serves as bargaining muscle in an adversarial model.[60] Even considering the assertion that 53 percent of the nonunion workforce want traditional unionism, 47 percent are left with nothing under the Act.[61] Certainly the 92.5 percent of the private workforce who are not unionized are not well served by the current system offering the choice of confrontationalism or nothing but rare, random opportunities for worker voice and participation.[62]

The Dunlop Commission's first goal for the 21st century workplace was to "[e]xpand coverage of employee participation and labor-management partnerships to more workers, more workplaces, and to more issues and decisions.[63] Labor policy and the Act should be modernized to offer worker/citizens what they want and what the economy needs.[64] The Teamwork for Employees and Managers Act would have made this positive adjustment. Unfortunately, it was vetoed by President Clinton.[65]

CONCLUSIONS

The dramatically reduced role played by unions and collective bargaining in the United States private economy is hardly attributable solely or even primarily to the workings of the legal regime.[66]

Yes, workers' rights are protected in the NLRB Representation Election process. And yes, workers' rights are protected during initial contract bargaining recognizing the fundamental policy of the freedom of contract.

The current legal regime is based on a model of the employment relationship that poorly reflects modern conditions. . . . [T]he focus of legislative efforts should be on lifting existing restrictions that limit representational options and encourage adversarial contests.[67]

This concludes my prepared testimony. I thank you again for directing attention to the issues of the modern workplace. I look forward to discussing my comments in greater detail during the question and answer period.

Senator HARKIN. Thank you, Mr. Raudabaugh and Dr. Lafer. Thank you very much for your testimonies.

Well, Mr. Raudabaugh, Mr. Lafer's report cites a number of management journals which encourage employers to avoid NLRB elections at all costs.

Do you believe that avoiding an election is the best strategy for employers that don't want unions?

Mr. RAUDABAUGH. The rhetoric and the union avoidance industry is mirrored by materials put out by most of the international

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[57] Id.; see also, Jeffrey M. Hirsch and Barry T. Hirsch, "The Rise and Fall of Private Sector Unionism: What Next for the NLRA?" Discussion Paper No. 2362 (2006).

[58] Electromation, Inc., 309 NLRB 990 (1992); enf'd, 35 F. 3d 1148 (7th Cir. 1994).

[59] "The Rise and Fall of Private Sector Unionism: What Next for the NLRA?" supra, p. 9.

[60] Bruce E. Kaufman, "The Two Faces of Unionism: Implications for Union Growth," 23rd Economics Conference, Middlebury College (2002).

[61] Richard B. Freeman, "Do Workers Still Want Unions? More than Ever," EPI Briefing Paper (2007); Richard B. Freeman and Joel Rogers, What Workers Want, Cornell University Press, 1999.

[62] "Private Sector Union Density and Wage Premium: Past, Present, and Future," supra, pp. 11–13.

[63] "The Dunlop Commission on the Future of Worker-Management Relations—Final Report," (1994), p. 20.

[64] Thomas A. Kochan, "Updating American Labor Law: Taking Advantage of a Window of Opportunity," 28 Comparative Labor Law & Policy J. 101, 113 (2007).

[65] Senate Report 105–12, 105th Congress, 1st Session, "Teamwork for Employees and Managers Act of 1997."

[66] James J. Brudney, "Isolated and Politicized: The NLRB's Uncertain Future," 26 Comparative Labor Law & Policy J. 221 (2005).

[67] "The Dunlop Report and the Future of Labor Law Reform," supra.

unions on their web pages and teachings at the George Meany College for Labor and believe me, sir, the rhetoric on union avoidance or get 'em, kill 'em, we'll win, that stuff is everywhere on both sides. So, it is what it is there.

Senator HARKIN. Well, again I'm just getting back to the point that if there's a number of management journals that encourage employers to avoid the elections at all costs, I just wonder if that's—you know, I know there's rhetoric on both sides.

I mean, I've been around quite awhile, but I'm just saying that, on the one hand, the employers don't want a card check, they say we can have elections, but on the other hand, all of the management journals and stuff that the employers get tell them to avoid an election at all costs.

Mr. RAUDABAUGH. Well, and then, on the other side, we have problems with the decision amendments that doesn't allow remedies for union violence which I certainly have experienced in prior representations.

So, once you get off into this area, believe me, all sides in the extreme have a great deal of rhetorical weapons at their use. To avoid election at all costs doesn't make sense to me any more than it makes sense to me to preclude employees from having group meetings with their employer to talk about things that are of interest to them and to the employer in the workplace setting.

Section 8(a)(2) cut that out. That makes no sense to me. Most people today are skilled and educated. Not everyone works in a foundry. I respect that. Not everyone works in an auto plant on an assembly line. I respect that. Some people, as I should have done, stayed growing corn, but the fact of the matter is not every workplace is a factory and to stifle 92.5 percent of workers in this country from being able to just visit and talk and dream up ideas to make things better in the workplace because they don't want to pay dues or they don't want to be in a very adversarial standoff between unions and management, it makes no sense.

We should have all of these available. People want unions, great. People want a different type of approach, great. We shouldn't make the choice unitary like that.

Senator HARKIN. Well, Dr. Lafer, do you have any idea how many illegal firings happen during elections? I hear there's a lot. Do we have any data on that?

Dr. LAFER. We do. As Chairman Schaumber and other people have noted, the NLRB unfortunately does not track firings or other unfair labor practices according to whether they occurred in an election context or not.

Senator HARKIN. I raised that issue earlier.

Dr. LAFER. So at that point, we don't have clear data. I submitted a Freedom of Information Act for the Nation as a whole over a 5-year period and analyzed that data.

Again you need to make assumptions. I used the most conservative assumptions possible about the perception of firings that take place in an election context, which is I used the assumptions advocated by business side analysts. According to my analysis, one in every 17 eligible voters, potentially eligible voters in NLRB elections is financially penalized, which means either fired, demoted, suspended or something else that results in a back pay remedy.

It's not 1 of every 17 union supporters. It's 1 of every 17 potentially eligible voters and these are only the cases that have been adjudicated to the point that the people actually collected back pay.

If you compare the rate of NLRB violations to the rate of FEC violations in Federal elections, what it looks like is that NLRB elections are 3,500 times dirtier than Federal elections.

Now, as anybody knows, any number, anybody who's looked at numbers knows that any number is only as good as the assumptions beneath it. Everybody can play with numbers. Suppose I'm wrong, not only wrong but wrong by an entire order of magnitude. That would mean that NLRB elections are only 350 times dirtier than Federal elections.

There are in any given year between 20,000 and 30,000 people who collect back pay remedies, adjudicated to the point where they collect them for having been financially penalized for being on the wrong side.

If Federal elections were run by this standard, in the 2004 presidential election cycle, we would have had 7.5 million Americans who either lost their jobs or were financially penalized for backing the wrong candidate and we would have thought we were living in East Germany or the old Soviet Union and we would be right because that is the level of fear that pervades the workplace in these elections.

Mr. RAUDABAUGH. I must respond. This must be why I chose to go to law school after getting my Master's degree in Labor Economics and Econometrics.

There's a difference between the classroom and the real world. I'm sorry. First of all, data. You can take data and samples and draw conclusions. The question here is, as we've even heard, well, I had to make adjustments, I had to make assumptions, and then to compare data and findings based on assumptions and corrections and adjustments and then compare it to things like democracy in Iraq or making these kinds of wild and rhetorical comparisons is not helpful.

What will be helpful to every legitimate academic and every lawyer and every citizen and every elected representative is a study based on data that we all begin with. It's accurate and it's complete.

The NLRB data over history has been represented in these same tables, they haven't been challenged before and that's not a negative, to present all of the data and correlate it between unfair labor practice events that occur in a particular time period between the filing of the petition and the election and we can create other time periods.

We should have a commission, and I certainly volunteer, let's have a discussion on the specific data that we need and then the Board's general counsel's office and our unit can begin the process of going forward from day one with data and you know what? In 1 year, we'll take 1 year's data and live with the findings, but to take data from Tama County, Iowa, over 1½ years ago and make corrections and adjustments and then make a conclusion is not necessarily representative of the United States of America, and this is exactly what academics do.

My paper, please read it and all the footnotes. Every one of these studies is forced to begin with data that is not the kind of strong material that we would want to work with and then it's limited to samples in uniquely geographic areas and then we're going to come up and remodel labor law for the entire country. That makes no sense to me.

Senator HARKIN. My problem, Mr. Raudabaugh, just to respond from my standpoint, as I pointed out to Mr. Schaumber, the latest reporting is 40 tables, 18 charts of labor violations, but no where does it tell me how many violations happen during elections. So, I don't have that data.

Mr. RAUDABAUGH. Exactly, and we need to get it, and we need to get it quickly, and we need to start this process. It seems to me that a group of people could volunteer to sit down with the necessary people at the Board, good econometricians, certainly my classmate who now is a Ph.D. and teaches at Princeton, Hank Farber, Henry Farber, I recommend him, recommend many people to sit down and let's develop exactly the data we need, what do we want, and then have the Board begin collecting and coding their data, all transparent, all available on the website, so every professor on earth can spend the next year writing and writing and writing, but all the data will be the same. I think we could all live with the results then.

Senator HARKIN. Dr. Lafer.

Dr. LAFER. You know, I'm not going to get into any kind of tit for tat here. My work has been out in public. I've yet to have anybody say this specific thing is false. I would welcome it if anybody could do so.

The 20,000 to 30,000 people collecting back pay remedies, that's data from the NLRB. That's not mine or anybody else's. I can tell you that I know many union organizers. When somebody goes—a union organizer goes out and talks to a group of workers about organizing a union, the first thing that workers ask is is there a chance I'm going to get fired? Every honest organizer has to say yes, it's likely that somebody here is going to get fired in any significant size unit.

Again, if we have imagine running campaigns for Senate or Congress like this, where you go out and ask somebody to put lawn signs in their yard or make financial contributions to a campaign and they say is there a chance if I make a donation to your campaign or put your sign in my yard, I could lose my job and you have to say yes, if you're honest, you know, some people could squeak by and win, but this is not an American system of democracy.

I'm not here to engage in rhetoric. I'm here to talk about the goal of the Wagner Act to introduce a measure of American democracy into the workplace and we need to be serious about what those standards are.

Mr. RAUDABAUGH. Certainly unions should not go around and collect license plate numbers and then find out who they belong to and engage in home visits and other terror that's reported in cases.

We're going to get nowhere if we're going to put up the horror stories on how awful management is and the horror stories of how awful——

Dr. LAFER. 30,000——

Mr. RAUDABAUGH [continuing]. Unions are.

Dr. LAFER [continuing]. People a year is not horror stories. There's an enormous number that's in Federal data.

Mr. RAUDABAUGH. Let's get real data from the Board——

Dr. LAFER. That is real data.

Mr. RAUDABAUGH [continuing]. And give it to the policymakers.

Dr. LAFER. That's not challenge data.

Mr. RAUDABAUGH. I'm sorry.

Dr. LAFER. That's not contested data.

Senator HARKIN. I'm sorry. What did you say, Doctor?

Dr. LAFER. 30,000 people a year collecting back pay remedies for having been illegally either fired, demoted, discriminated or some other way punished that resulted in them losing pay. That's not mine. That's not an academic number. That's the Board's number. It varies from 20,000 to 30,000 in each of the last few years of cases adjudicated to the point that people collect back pay remedies, and then there's the debate how many of those happened in election and how many of those not in election. Significant percentages happen in each, but that is an enormous number and that's not a contested number.

Mr. RAUDABAUGH. We can also look at the data and the material that will flow from a variety of RICO actions that have taken place and are underway to look at approaches to bringing down management, to force them to recognize unions by doing things that are unlawful under very different statutes and laws as well.

I don't really think we're going to get—nothing positive here. No one wants to—I don't want to go off on unions or have someone go off on management. I'm just a citizen. I would like us to have the data so you folks can ask the questions and get answers to your questions and we don't have the data.

Dr. LAFER. I guess the last thing I'd say is everybody's for data. Of course there's agreement we should get better data, but we have a lot of experience with this and there are millions of American workers who are waiting for this system to work better. We should get better data, but we don't need to wait to get better data to know what is fundamentally wrong with this law, even when it works completely legally.

Mr. RAUDABAUGH. There are tens of millions of people who would not make the choice in the first place because they're now in new types of jobs with new skills and doing things where that particular model is not of interest.

Even if you take the reported materials on the AFL–CIO website that various academics have done studies on attitudinal views of the union and they say 54 percent of American citizens want a union but can't get one, well, that certainly leaves 46 percent of Americans that don't want a union.

Senator SPECTER. I'm beginning to think you fellows are not going to agree.

Dr. LAFER. I think we agree on that.

Senator SPECTER. Is it about my turn?

Senator HARKIN. The Chair recognizes the Senator.

Senator SPECTER. You've had your turn, now it's my turn.

Dr. LAFER. Yes, sir.

Senator SPECTER. Mr. Raudabaugh, in a speech you gave before the Federal Society on March 13, 2007, you said that secret ballot elections together with a freely informed workforce are essential to workplace democracy, but you say that there have to be laboratory conditions for a free and fair secret ballot.

What are these laboratory conditions and how do we get them?

Mr. RAUDABAUGH. The laboratory condition is a term the Board has used for a very long time and, of course, what we try to do under Board law is allow anyone who feels that there has been improper tactics used during the period leading up to the election to file either unfair labor practices, if it's a very toxic kind of behavior, or to file objections to the election, saying that they felt that their space had been intruded——

Senator SPECTER. But they did not have laboratory conditions?

Mr. RAUDABAUGH. That they were being pushed or shoved or being intruded on in terms of allowing them to make a fair——

Senator SPECTER. So, how do you suggest we move to get these laboratory conditions?

Mr. RAUDABAUGH. Well, actually, that's the Board process as it stands, and one can attempt to rectify a bad situation by filing charges or objections, getting a rerun election, and in the worst case, the Board does have the authority to issue a Gissle bargaining order and require the parties to proceed to bargain if the tactics used were really appalling.

Senator SPECTER. Professor Lafer, in your written testimony before the House of Representatives, February 8, 2007, you say, "Research shows that in a typical campaign, most employees never even have a single conversation with a union representative."

What's your empirical basis? What research shows that?

Dr. LAFER. That's from a study done by Dr. Kay Bronfenbrenner, who's a professor at Cornell University, who did a study of elections, I believe it was in units of 50 employees or more, and that basically because pro-union employees where the union gets the list of contact information for employees and that because under law it says name and address but the common practice of—when you run into anti-union employers is to give name and address but not apartment number.

Senator SPECTER. Well, do you know what the empirical basis is, what the——

Dr. LAFER. Yes, it was a statistically——

Senator SPECTER. Let me finish the question.

Dr. LAFER. Excuse me. I'm sorry.

Senator SPECTER. My question started out to be do you know what the empirical basis was to come to such a sweeping conclusion that most employees never have a single conversation with the union representative?

Dr. LAFER. It was a statistically significant study of units of 50 employees or more.

Senator SPECTER. What kind of—it would have to be a massive study to come to such a sweeping conclusion, sweeping generalization like that.

Dr. LAFER. I would be happy to get the study and provide it to your staff, but I can tell you that the only studies that I have ever looked at or have ever talked about are things that are statistically

significant which means the sample size is large enough to draw statistical conclusions from it. It is not a skewed sample. It is not an anecdotal sample.

Senator SPECTER. How big's the sample have to be to have that profundity?

Dr. LAFER. I believe in the thousands, but I'm happy to get you those details.

Senator SPECTER. Okay. I would like that. Mr. Raudabaugh, you talked about the option of confrontational or nothing. What do you mean by that?

Mr. RAUDABAUGH. The academic research, the people mentioned here, Kochan, Bronfenbrenner, go down the list, they're all in the cites in my paper, acknowledge that what we created in 1935 was a system of confrontational representation. The union comes in, it represents in bargaining, bargaining just like buying a house or whatever. I want 50 cents more, but we can't, back and forth, back and forth.

The system is us versus you, labor-management or management-labor, however you see it, and what we're looking at and what we were hoping for and what I pray for is simply making an adjustment among several others you have mentioned today that I think are good and go back and get 8(a)(2) corrected and allow at least those people who choose not to join a union in workplaces that are different today and wouldn't pick a union under any circumstances and the literature suggests——

Senator SPECTER. Excuse me. You've made the point and I don't have much time.

Mr. RAUDABAUGH. Okay. Sorry.

Senator SPECTER. Dr. Lafer, do you think there's any merit in what Mr. Raudabaugh has suggested about the consultants and having some outside agency come in and take a look at what the NLRB has—outside consultants come in and take a look at what the NLRB has done and how they're functioning?

Dr. LAFER. Like collecting better data, I think it's a good but marginal improvement. If the system works perfectly, according to its laws, it works like elections that we don't allow for voters any place else in the world. I think that's the fundamental problem, that until that is changed, yeah, we can make marginal improvements——

Senator SPECTER. You don't think the consultants would amount to much?

Dr. LAFER. I don't, no. No, sir.

Senator SPECTER. A final question for you, Mr. Raudabaugh. You talk about due process requiring prehearing, discovery, subpoenas. You talked about Article 3 court. That would really provide an enormously more complex mechanism which would certainly result in very considerable delay, wouldn't it?

Mr. RAUDABAUGH. That's the problem.

Senator SPECTER. Talking about discovery.

Mr. RAUDABAUGH. That's the big negative, but on the—no question about it. On the other hand, if you're going to listen to people, they cherrypick what they want and we want this, we want that, and we want more penalties, we want this, we want that.

You know, to my knowledge, I think that you don't convert a restorative remedial structure into one that's punitive if you're not going to grant due process.

Senator SPECTER. Are you seriously serious about suggesting that as an alternative to the present system?

Mr. RAUDABAUGH. Yes, actually, after my term on the Board, I gave a speech at the 50th Anniversary of the Industrial Relations Research Association in Philadelphia, and I made that suggestion and for a variety of reasons.

Senator SPECTER. Did you ever press the Board to have some consultants and do the kind of a study that you have articulated here today when you were a member of the Board?

Mr. RAUDABAUGH. Yes.

Senator SPECTER. No results?

Mr. RAUDABAUGH. I don't think I heard the question. I'm sorry.

Senator SPECTER. Well, you already answered it. When you were on the Board, did you ever suggest to your other members——

Mr. RAUDABAUGH. Oh.

Senator SPECTER [continuing]. To undertake the kind of studies that you're recommending here today?

Mr. RAUDABAUGH. When I was on the Board, I was trying to get the cases out and we got out over 1,100 cases a year, publicly reported cases.

Senator SPECTER. Oh, I know you did a great job when you were on the Board.

Mr. RAUDABAUGH. Yes, sir.

Senator SPECTER. But what I want to know is, when you had that position of power, did you ever make these suggestions that you're making here today?

Mr. RAUDABAUGH. No, because simply I didn't think about it because there wasn't the outcry at that time about all the statistical material and it didn't occur to me.

Senator SPECTER. Thank you very much, Mr. Raudabaugh. Thank you, Dr. Lafer.

Mr. RAUDABAUGH. Thank you.

Senator SPECTER. Thank you, Mr. Chairman.

Senator HARKIN. Thank you, Senator Specter. Well, again, just in closing, Mr. Raudabaugh, you know what the Employee Free Choice Act bill is. Just briefly, would you think that would be a step in the right direction to help or not? The card check where they check off the card and then they would——

Mr. RAUDABAUGH. Well, there's two—certainly two prongs that are a problem. One is the cram-down contract by some outside professor telling you I'm picking this term, this term, the interest arbitration is unacceptable, and then the second point, the penalties attached on the issues I just discussed with Senator Specter and then we're down to the simple process of cards as an alternative.

If we apply the same rules for prohibiting coercion and threats and the solicitation of the cards, right, and we have proof that they're solicited in a very neutral way, then that's one thing.

You know, in terms of having the ability to challenge that is critical, so that if you had card check only from the EFCA bill, you should have the right then to have employees come forward and re-

quire an election if there's any evidence at all of untoward behavior in the gathering of the cards.

Senator HARKIN. Dr. Lafer, same question about the Employee Free Choice Act, whether that would be a——

Dr. LAFER. The Employee Free Choice Act is a modest but important step in the right direction. If you would say let's make—let's forget about card check, let's make NLRB elections work the way elections for the Senate or the presidency work, you, would have to say no corporation can say anything to its employees about how they should vote, union employees have to have equal rights to circulate leaflets as management does, nobody can be forced to attend a meeting, organizers have to have access to the property.

I would support that, but that is a much more sweeping vision than by comparison to that the Employee Free Choice Act is a much more modest agenda, but I do think that it goes in the right direction. There are now—depending on which poll, which number you believe, between 25 and 60 million American workers say they wish they had a union but they don't have one. Only half a million a year get—are newly organized into unions and so there's a representation gap of that difference and the 25 million number is the business lobby's number.

So, even if you take that low number, that's 24.5 million people in America saying we wish we had a union and we don't have one. The nature of this election system, I think, is one of the primary reasons why we have that representation gap. I think this would be a modest but important step toward addressing that.

Mr. RAUDABAUGH. If we also address the multiple millions of people who know they don't want a union but would like the freedom in this country to talk in groups with employers about a variety of issues would be helpful, too.

ADDITIONAL COMMITTEE QUESTIONS

Senator HARKIN. There will be some additional questions which will be submitted for your response in the record.

[The following questions were not asked at the hearing, but were submitted to the Board for response subsequent to the hearing:]

QUESTION SUBMITTED BY SENATOR TOM HARKIN

Question. Chairman Schaumber, can you provide information about the NLRB's financial support for the training its employees over the last 5 years? I understand that training is a key part of the contract and there are concerns that the NLRB may not be meeting that commitment.

Answer.

NLRB FINANCIAL SUPPORT FOR TRAINING (FISCAL YEAR 2004–2008)

The Agency funds extensive training for employees covered and not covered by collective bargaining agreements. For employees covered by collective bargaining agreements, the Agency provides funds for individual training as specified in the bargaining agreements and also provides group training targeted at critical skill needs.

TOTAL FUNDING PROVIDED

Fiscal year	Amount
2008	$370,000
2007	457,000

TOTAL FUNDING PROVIDED—Continued

Fiscal year	Amount
2006	554,000
2005	[1] 1,011,000
2004	496,100

[1] Includes non-recurring costs for periodic agency conferences.

From fiscal years fiscal year 2004-fiscal year 2008, collective bargaining individual training was fully funded in each fiscal year except fiscal year 2004:

For fiscal year 2008, training was fully funded at the beginning of the fiscal year;

For fiscal year 2007, training funding was suspended due to the Continuing Resolution and low funding for the Agency as a whole and fully funded in July when funds became available;

For fiscal year 2006, funding was suspended during the Continuing Resolution and fully restored after the Continuing Resolution expired;

For fiscal year 2005, funding was suspended during the Continuing Resolution and fully restored after the Continuing Resolution expired;

For fiscal year 2004 collective bargaining individual training was funded at 56 percent in fiscal year 2004 along with other non unit individual training accounts due to low overall Agency funding. (Note that for all of these years, training for bridge (upward mobility) participants was fully funded throughout the fiscal year.)

Looking at highlights of group training, as Agency funding permitted, we:

Offered conference training on the provisions of the National Labor Relations Act for new employees, trial training for more experienced employees, and refresher training for senior employees.

Contracted with a nationally recognized legal writing expert to create an 11-module videotape program for Field Agents and with a university Law professor to provide customized legal writing training and coaching for Headquarters Attorneys.

Used in-house experts to create over 30 instructor script/classroom activity modules on critical Agency case law and procedures. Local instructors throughout the country use these, thereby insuring consistent training Agencywide.

Provided all Support Staff employees training on "Time Management," "Oral Communications," and "Conflict Management" by video conference and on "WorkSmarts" by facilitated videotape training. We are also working on a facilitated videotape program on Grammar for all Support Staff employees.

Delivered a "Training Tuesdays" program for all employees which uses short net meeting or videoconferencing sessions that focus on immediately applicable skills or information.

QUESTIONS SUBMITTED BY SENATOR ARLEN SPECTER

Question. Does the NLRB publicly report statistics regarding Petitions for Election and Decertification and/or publicly provide access to the Petition as filed? If not, why not and what would be required to do so and at what least cost while assuring accuracy in reporting or posting such information?

The agency does not prepare public statistical reports regarding pending Petitions for Election and Decertification. Select information regarding pending Petitions for Election and Decertification is available to the public through the NLRB's Electronic Case Information System (ECIS), located on the agency's website www.nlrb.gov (under the E-Gov tab). ECIS provides access to current case information, including case status, for all representation cases. Copies of petitions filed are available to the public via a FOIA request, and numerous persons and organizations throughout the country routinely request and are provided copies of such petitions.

ECIS is one part of ongoing program of the agency begun in 2003 to implement the President's Management Agenda and E-Gov initiatives. Our goal has been to make our processes, procedures, decisions and general activities more transparent to the public. We have renovated the agency's website by greatly expanding its content, making it interactive, more user-friendly, and enhancing its E-Filing capacity. The site recently was recognized as one of the five best in the Federal Government by the National Security Archive (NSA), a nongovernmental research institute and library located at George Washington University. Our ultimate objective is to make all data and documents, otherwise disclosable under FOIA, available to the public on our website.

Our most recent technology initiative in this process is to transition from multiple legacy case tracking systems to an enterprise-wide case and document management

system. When completed, this system, called the Next Generation Case Management System (NextGen), will give the public online access to extensive case information, statistical reports and related documents. NextGen is our highest priority technology initiative.

As originally planned, NextGen was to be completed in early 2009. Due to budgetary constraints, however, we were required to incrementally fund the project, which may result in extending the project timeline by up to two years. With additional funding, we would be able to complete NextGen earlier.

Question. Does the NLRB publicly report statistics and/or publicly provide access to the final outcome for each Petition for Election or Decertification? If not, why not and what would be required to do so and at what least cost while assuring accuracy in reporting or posting such information?

Answer. The agency prepares historical reports on closed cases that provide statistics relating to the elections held, eligible voters, valid votes counted, and where certification of representative or certification of results has been issued in cases closed during the fiscal year. The Election Report is available on a monthly basis and a summary report of the certified elections is published every 6 months. These reports are available to the public on the agency's website under the "Publications" tab and then "Reports". Select information regarding specific Petitions for Election or Decertification is available to the public online through ECIS. When completed, NextGen will provide real-time representation case statistics online to the public.

Question. Does the NLRB publicly report statistics and/or publicly provide access to information permitting analysis to determine by Petitioner union and employees' employer (a) the number of Petitions for Election or Decertification filed, (b) the number of Petitions for Election or Decertification processed through election and certification of results, and (c) the outcome—for or against petitioner—in each case. If not, why not and what would be required to do so and at what least cost while assuring accuracy in reporting or posting such information?

Answer. The agency does not prepare public statistical reports sorted by Petitioner union and employees' employer. When the public files a FOIA request for such information, we routinely prepare reports in response to those specific requests.

As mentioned above, ECIS enables the public to perform searches of representation case information. The results are presented on a case-by-case basis. It does not offer any statistical analysis tools, nor does it allow the public to download the data for independent statistical analysis. However, we have permitted direct access to one of our legacy case tracking systems by outside organizations based on a showing of need. We currently allow direct access by the AFL–CIO and we have allowed academics this same access. When completed, NextGen will allow the public online access to all FOIA-able data for independent analysis and reporting.

Question. Does the NLRB publicly report statistics and/or publicly provide access to information permitting analysis to determine (a) the number of requested card-check recognitions, (b) the number of requested card-check recognitions voluntarily accepted/recognized by the employees' employers? If not, why not and what would be required to do so and at what least cost while assuring accuracy in reporting or posting such information?

Answer. Historically, the agency has not collected statistics on card-check recognitions. Employers and unions who enter into such a recognition agreement pursuant to a card-check may advise the NLRB of the agreement and request that the agency provide a Notice to Employees advising them of their right to file a decertification petition in accordance with the Board's decision in Dana Corp., 351 NLRB No. 28 (September 29, 2007). The NLRB does record information concerning these "Dana" requests and provides it to the public upon request.

The FMCS may separately collect information on card-check recognitions in connection with its mediation function.

Question. Does the NLRB publicly report statistics and/or publicly provide access to information permitting analysis to determine by requesting union and employees' employer (a) the number of requested card-check recognitions and (b) the number of requested card-check recognitions voluntarily accepted/recognized by the employees' employers? If not, why not and what would be required to do so and at what least cost while assuring accuracy in reporting or posting such information?

Answer. See answer to the previous question above.

CONCLUSION OF HEARING

Senator HARKIN. Thank you both very much. That concludes our hearing.

[Whereupon, at 11:20 a.m., Wednesday, April 2, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

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